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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

FLORIDA ECONOMIC ADVISORY COUNCIL, *Petitioner*

v.

FEDERAL POWER COMMISSION, *et al., Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Florida Economic Advisory Council prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this cause on December 4, 1957, rehearing and rehearing *en banc* denied on January 9, 1958.

OPINIONS BELOW

The majority and dissenting opinions of the Court of Appeals are not yet reported. They appear as Appendix A hereto, *infra*, p. 1a. The majority and dissenting opinions and the order of the Federal Power Commission issued December 28, 1956, Opinion and Order 301, appear as Appendix B hereto, *infra*, p. 21a. The order of the Commission issued February 21, 1957 appears as Appendix C hereto, *infra*, p. 68a. The Order of the Commission issued April 18, 1957 appears as Appendix D hereto, *infra*, p. 93a.

JURISDICTION

The jurisdiction of this Court is invoked under Section 1254(1) of Title 28 of the United States Code and under Section 19(b) of the Natural Gas Act, 15 U.S.C. 717(b). The judgment of the Court of Appeals was entered on December 4, 1957. Petitions for rehearing and for rehearing *en banc* were denied on January 9, 1958.

QUESTIONS PRESENTED

1. Section 8 of the Administrative Procedure Act authorizes an administrative agency to omit the intermediate decision procedure upon a finding that the "due and timely execution of its functions imperatively and unavoidably so requires." Does this language permit the Federal Power Commission to omit the intermediate decision procedure in proceedings under Section 7 of the Natural Gas Act on an application for a certificate of public convenience and necessity on the ground that the gas purchase contracts of the applicant gave both parties an option to cancel the contracts unless the Commission took final action on the application by a date certain?

2. In proceedings on two contested applications for certificates of public convenience and necessity under Section 7 of the Natural Gas Act there were more than 30 days of hearings and some 20,000 pages of record made by some 50 witnesses. The Federal Power Commission ordered the intermediate decision procedure omitted 8 days after the hearings were closed and issued an opinion and order 22 days after that. Was the effect of this undue haste to deprive Petitioner of a full and fair hearing in violation of its rights under the principles of *Morgan* v. *U. S.*, 298 U.S. 468?

3. In proceedings under Section 7 of the Natural Gas Act the Federal Power Commission finds on the record after hearing that applications for certificates of public convenience and necessity have such basic defects that they would have to be denied as they stood. Can the Commission nevertheless grant the applications subject to future compliance by the applicants with various substantial conditions designed to correct the basic defects, and thereafter, on the basis of undisclosed data submitted to it by the applicants *dehors* the record, make *ex parte* findings that applicants have complied with the conditions?

4. Where the uncontroverted evidence shows that sellers, buyers and transporters of natural gas, acting in concert, fixed the delivered price of natural gas to the buyer without regard to cost but rather to assure that it would be below the price of competing fuel oil for a period of 20 years, and this action was appropriately challenged as violative of the public policy of the United States expressed in the anti-trust laws, is the Federal Power Commission required to consider and make findings thereon?

STATUTES INVOLVED

The pertinent provisions of the Natural Gas Act, 52 Stat. 821, 15 U.S.C. 717 et seq., and of the Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. 1001 et seq., are set forth in Appendix E hereto, *infra*, p. 94a.

STATEMENT OF THE CASE

On August 26, 1955, Houston Texas Gas and Oil Corporation and on February 8, 1956, Coastal Transmission Corporation filed applications with the Federal Power Commission under Section 7(e) of the Natural Gas Act, 15 U.S.C. 717f(e), for certificates of public convenience and necessity to construct and operate natural gas pipelines from South Texas to Miami, Florida. As the applications were amended during the course of the hearings, Coastal proposed to buy some 100,000 mcf of natural gas per day in Texas, transport it to Baton Rouge, Louisiana and there sell it to Houston. Houston proposed to transport the gas from Baton Rouge to Florida, and there sell it to industrial users, electric generating plants, and various existing and proposed local distribution companies. In addition Coastal and Houston proposed to transport some 150,000 mcf of natural gas per day for two Florida power companies. Florida Power and Light Company would buy and take title to 100,000 and Florida Power Corporation to 50,000 mcf of gas per day in Texas directly from producers. This gas would be transported to Florida for them by Coastal and Houston and there delivered to them for use as boiler fuel in their electric generating plants.

Petitioner, an association of fuel oil dealers, truck lines, marine transportation companies, terminal operators and allied businesses, sought and was granted

leave to intervene in the proceedings. Consolidated hearings on the applications before an Examiner of the Commission were commenced on July 9, 1956 and concluded on November 28, 1956. There were more than 30 days of hearings and some 50 witnesses. The Record contains 8,110 pages of transcript and 332 exhibits, the bulk of them voluminous. Petitioner participated actively throughout the hearings, cross-examining Applicants' witnesses and introducing direct evidence.

The evidence adduced by Petitioner showed the substantial extent to which its members would be aggrieved by the grant of the applications (R. 115 et seq.),[1] and rebutted in significant part the evidence of Applicants that their proposed project was in the public interest. Among other things Petitioner's direct evidence (R. 99 et seq., 375-386) laid bare the fact that, as found by the Commission in Opinion 301, Applicants' rates for transportation were substantially below the cost of rendering the transportation service and that other classes of service would be required by reason of the transportation arrangement to assume a proportion of the cost of operations in excess of their fair share. *Infra*, pp. 42a, 43a. On cross-examination by Petitioner it was made clear that the contracts for the sale by the producers and the transportation by the applicants of gas for the two Florida power companies were the result of the concerted action of the producers, applicants and power companies, and were designed without regard to the cost of service, but rather to assure the latter that the delivered cost of gas to them would be below the price of Bunker "C" Fuel Oil for a period of 20 years. (R. 92, 92a, 93, 94, 95). *Infra*, p. 42a.

[1] Unless otherwise noted record references are to the pages of the joint appendix printed for the use of the Court of Appeals.

During the hearings, on November 14, 1956, Applicants moved on the record for the omission of the intermediate decision procedure. The ground of the motion was that contracts between Coastal and its gas suppliers gave the suppliers an option to cancel them if Coastal had not been granted a certificate of public convenience and necessity by December 31, 1956. (R. 68k). Petitioner and other parties objected to the motion. On November 16, the Examiner reported the motion and the argument thereon to the Commission, noting that the status of the hearing was such that no action on the motion could be taken by the Commission because some dozen witnesses of Houston and supporting interveners remained to be cross examined, and because at least one and possibly three opposing interveners would present affirmative cases in opposition to the granting of certificates. (R. 410).

As part of their motion for omission of the intermediate decision procedure Applicants moved that the time for filing briefs be fixed as follows: Seven days after the record was closed for Applicants, seventeen days after the record was closed for the Commission's Staff and all interveners, twenty days after the record was closed for replies. At the close of the hearings on November 28 the Examiner fixed briefing dates as follows: December 5 for Applicants and supporting Interveners; December 10 for Commission's Staff; December 20 for opposing Interveners; December 27 for Replies. Counsel for Coastal asked the Examiner to advance the date fixed for opposing Interveners. He refused to do so, saying that he did not feel it would amount of due process to cut the time shorter by even one day. (R. 185).

On December 6, 1956 the Commission issued an order omitting the intermediate decision procedure, denying oral argument, shortening the briefing time for opposing Interveners by five days, i.e., from December 20 to December 15, and shortening the time for replies by seven days, i.e., from December 27 to December 20. (R. 411 et seq.). Petitioner immediately filed a motion for extension of time to December 20 to file its brief and for oral argument. (R. 415). On December 13, 1956 the Commission denied the extension of time but set the matter for oral argument on December 21. (R. 421). In its order omitting the intermediate decision procedure the Commission took cognizance of the fact that the dates upon which Coastal's gas purchase contracts became subject to cancellation were fixed by the parties to them. It therefore said that it was not "adopting a policy of permitting Applicants to fix and assert date deadlines within which time the Commission must act . . . as a grounds or basis for a waiver of the intermediate decision procedure." Nevertheless, it did just that, grounding its order on a finding that "unless final action is taken by the Commission prior to December 31, 1956, the gas purchase contracts of Coastal will be subject to cancellation, and unless the intermediate decision procedure is omitted, it appears that a decision by the Commission cannot be rendered before December 31, 1956." (R. 412).

Oral argument was had on December 21 and on December 28 the Commission issued a majority opinion of 31 pages and a minority opinion of five pages. This Opinion and Order 301 granted the applications subject to various conditions to be met by the Applicants in the future. The Commission characterized the conditions as substantial, but found that the only

alternative to them was a denial of the applications. *Infra,* p. 39a. They were indeed substantial. For example, Houston was required *inter alia,* to redesign its rates for firm sales for resale, for interruptible sales and for transportation to make them commensurate with the cost of service determined on a reasonable allocation of costs between the three services in accord with usual Commission standards and based on a rate of return of not more than 6%. *Infra,* p. 58a. Coastal was required, *inter alia,* to redesign its tariff to fix charges to Houston based on a cost of service formula providing separate charges for gas sold and for gas transported based on a reasonable allocation of costs between the two services in accord with usual Commission standards. *Infra,* p. 59a. The charges for the first six months of operation were required to be based on a rate of return of 6%, and those for the succeeding six months to be based on the overall rate of return to the two companies for the preceding six months but not more than 6%. Both Coastal and Houston were required to change their financing arrangements to increase their equity capital to at least 15%, to decrease their bonded indebtedness to not more than 75%, and to preclude the payment of dividends on common stock as long as their interim notes were outstanding. *Infra,* p. 60a.

On January 24, 1957, Houston filed an application for rehearing which sought the elimination of some of the conditions. (R. 495 et seq.). The application, which was served on all parties to the proceedings, alleged that Houston had complied with the rate conditions described above, but contained nothing to show compliance, merely referring in support of the allegation to material submitted to the Commission *dehors*

the record and not served on the parties. (R. 497). On January 28 Petitioner filed a petition for rehearing of Opinion and Order 301. (R. 533 et seq). On February 1, 1957 Petitioner filed an answer to Houston's application for rehearing objecting to it on the ground, *inter alia,* that Houston had not shown compliance with the rate conditions and that, in any event, the issue of compliance *vel non* was required to be determined on the Record after hearings. (R. 588 et seq). On February 6, 1957 the Commission's Secretary rejected and returned Petitioner's answer to Houston's application for rehearing on the ground that the Commission's rules did not allow answers to to applications for rehearing. (R. 550). On February 12, Petitioner filed an appeal to the Commission from the Secretary's answer. (R. 551).

On February 21, 1957 the Commission issued an order, *infra,* p. 68a (1) denying Petitioner's Petition for Rehearing, (2) denying its appeal from the Secretary's rejection of its answer to Houston's application for rehearing, (3) granting in part and denying in part Houston's request for modification of some of the conditions imposed in Opinion and Order 301, (4) extending the time for compliance with other conditions and (5) finding that both Coastal and Houston had complied with the rate conditions described above. The findings of compliance with the rate conditions were based on "the record in this case *and* the filings submitted by Coastal and Houston Gas". (Emphasis supplied). The filings were described as "revised tariffs", an "executed service agreement" between Coastal and Houston, and "various supporting materials", *Infra,* p. 69a. The material certified by the Commission to the Court of Appeals as the record in the proceedings be-

fore it contains what are apparently "the filings submitted by Coastal and Houston Gas." (R. 477-532). These filings are of course not part of the record, as the Commission recognized when, in its Order of February 21, it distinguished them from "the record in this case." None of these filings were served on Petitioner. Indeed, Petitioner did not know of the existence of Coastal's filing until the Commission referred to it in its order of February 21, and did not know its contents until it was certified to the Court of Appeals.

Petitioner, through the courtesy of counsel for one of the supporting interveners, was able to make a cursory examination of part of the material filed by Houston. The material examined showed on its face (R. 479, 483) that the cost of service for each class of sale subject to the regulatory authority of the Commission exceeded the revenues from each class, that of the total deficiency in revenues the largest share was in revenues from the two Florida power companies for transportation of their gas, and that the deficiency in those revenues was proportionately larger than the deficiency in revenues from sales to distribution companies for resale, an obvious unlawful discrimination against the ultimate consumers. Although it was not possible to determine from the face of the material the methods used in allocating costs or the validity of the allocations made among various classes of service, Houston admittedly did not segregate for allocation purposes costs that were not readily determinable (R. 482) and did not make any allocation of costs between the two power companies, although the transportation rate to one was 4 cents per mcf higher than the rate to the other.

On March 25, 1957, Petitioner filed a petition for rehearing of the order of February 21, again challeng-

ing the propriety of *ex parte* findings of compliance with the rate conditions based on material *dehors* the record. (R. 584 et seq.) On March 29 the Commission's Secretary rejected and returned this Petition for Rehearing on the ground that the order was on applications for rehearing and therefore Petitioner's petition was merely an improper consecutive application for rehearing. (R. 594). On April 4, 1957 Petitioner appealed to the Commission from the Secretary's action. (R. 595). On April 18 the Commission denied this appeal. *Infra*, page 93a.

Thereafter, Petitioner, pursuant to Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b), filed with the Court of Appeals for the District of Columbia Circuit a petition to review the Commission's Opinion and Order No. 301 and its Order of February 21, 1957, (R. 1), and a second petition to review the Commission's order of April 18, 1957. (R. 579). The Court of Appeals consolidated the two petitions and permitted Coastal, Houston, the Florida Public Utilities Commission and the Florida Development Commission to intervene in support of the Commission's orders. The matter having been briefed and orally argued by all parties, the Court of Appeals, on December 4, 1957, issued its opinion and entered judgment affirming the Commission's orders. Presiding Judge Bazelon filed a dissenting opinion on December 12, 1957, which he supplemented on January 15, 1958. Petitioner filed a petition for rehearing, or alternatively for rehearing *en banc*. This was denied in separate orders issued January 9, 1958.

REASONS WHY THE WRIT SHOULD BE GRANTED

Preliminary Statement

This is not a case in which the issues on judicial review are merely whether the Federal Power Commission correctly applied established principles and rules of law upon the record before it in a particular proceeding. This is a case in which the issues require the definition of the fundamental principles and rules of procedure to be applied by the Commission in the administration of the Natural Gas Act and by it and other administrative agencies in the implementation of the Administrative Procedure Act. Thus, the first and third questions presented by Petitioner, *supra*, p. 2, 3, are questions of federal law that are of general, widespread and day-to-day public importance. They have not been settled by this Court. They should be so settled, especially since they were erroneously decided by the Court of Appeals in a cursory majority opinion that is neither grounded on an accurate reflection of the facts nor gives the Federal Power Commission any authoritative or clear standards for the administration of the law. The second and fourth questions presented were decided by the Court of Appeals in clear conflict with the previous decisions of this Court.

The questions presented should be settled by this Court in this case because: (1) Petitioner is aggrieved by the Commission's orders and challenged those orders on the ground that the Commission had misconceived and mis-defined the principles and rules of law that the Natural Gas Act and the Administrative Procedure Act require it to follow. (2) There are no independent grounds on which the orders can be held valid, or, to put it conversely,

the resolution of the questions is necessary to determine the validity of the Commission's orders. There are therefore special and important reasons for the exercise by this Court of its jurisdiction to review the judgment of the Court of Appeals on writ of certiorari. See Rule 19 of this Court.

The Omission of the Intermediate Decision Procedure

Section 8(a) of the Administrative Procedure Act permits the intermediate decision to be omitted where "the agency finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires." As far as we can ascertain the only case in which a court has undertaken to consider either the scope of an agency's power under this language or the criteria for its exercise is *Kenny* v. *U. S.*, 103 F. Supp. 971, decided in 1952 by a three-judge District Court for the District of New Jersey. In that case the Interstate Commerce Commission granted an increase in passenger fares to a rail carrier after omitting the intermediate decision of the trial examiner. The Court held that since the plaintiffs had not objected to the order of omission before the Commission, their objection made to the Court should be dismissed. Nevertheless, the Court expressed the opinion that the quoted language was "intended to permit the omission of a preliminary report or tentative decision where, as here, the law imposes upon the agency the duty to proceed expeditiously." 103 F. Supp. at p. 977. It then said that there was such a duty in the case before it. It based this on the requirement of the Interstate Commerce Act that, in the words of Section 15(7) thereof, the Commission "give to the hearing and

decision [of proceedings on rate changes] preference over all other questions pending before it and decide the same as speedily as possible."

The standard established by the *Kenny* Case for the omission of the intermediate decision has no relevance in proceedings such as this because this is a certificate case, not a rate case. There is no duty on the Federal Power Commission in certificate cases, such as there is in rate cases under Section 4 of the Natural Gas Act, to give them preference over other cases or to decide them as speedily as possible. So too, the only two cases in which courts have dealt with the omission of the intermediate decision by the Federal Power Commission in proceedings under the Natural Gas Act were rate cases. *Colorado Interstate Gas Co.* v. *F. P. C.*, 209 F. 2d 717 (C.A. 10th 1954), rev'd. 348 U.S. 492; *Alabama Tennessee Natural Gas Co.* v. *F. P. C.*, 203 F. 2d 494 (C.A. 3rd 1953).

In the *Alabama Tennessee* Case it was not necessary for the Court to spell out the criteria for the exercise by the Commission of its authority to omit the intermediate decision procedure. The order under review was on reopened proceedings respecting the tariff of a newly certificated pipeline. The intermediate decision procedure had been omitted at the request of the pipeline in the original proceedings, which the Court found had been on essentially the same issues as the reopened proceedings. The Court therefore disposed of the issue by saying that it was not able to see "such a difference between the two situations that what was reasonable when the company requested it in 1950 became arbitrary when the company opposed it in 1952," 203 F. 2d at p. 498.

The *Colorado Interstate* Case was a proceeding under Section 5 of the Natural Gas Act initiated by the Commission *sua sponte* for the purpose of determining whether Colorado Interstate's existing rates were unreasonably high. The Commission omitted the intermediate decision procedure on the ground that the case had been pending there years and "that there was good reason to believe that the rates being exacted were excessive." 209 F. 2d at p. 722. The Court, although it reversed the Commission's order on other grounds, said that this was not an abuse of discretion. This *dicta* may be supportable under the reasoning of the *Kenny* Case, *supra*, especially since under the rule of *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, gas users who have paid unreasonable rates cannot recover reparations in either court or Commission. Be that as it may, it has no bearing in this certificate case.

The only cases the majority of the Court of Appeals cites in the case at bar are just as irrelevant here as those just discussed. *Chotin Towing Corp.* v. *F. P. C.*, 250 F. 2d 394 (1957), held only that the intermediate decision could not be omitted in proceedings on an application that was not one for an initial license. *Channel 16* v. *F. C. C.*, 229 F. 2d 520 (1956), held only that the intermediate decision could not be omitted where there was no finding that due and timely execution of the agency's functions imperatively and unavoidably so required. *R. C. A. Communications Inc.* v. *F. C. C.*, 238 F. 2d 24 (1956), held only that the omission of the intermediate decision did not require reversal because no appropriate and timely objection to the omission had been made, and because the proceeding in

which it was omitted was not an original proceeding but a further proceeding on remand from the Supreme Court.

In contrast to all of these cases, the majority of the Court of Appeals in this case establishes the rule that, despite timely, appropriate and continued objection, the intermediate decision procedure may be omitted whenever there is *merely a naked possibility* deliberately created by an applicant for a certificate of public convenience and necessity that if the Commission does not act by a date certain an event may happen, and, if it happens, there is then created a further *naked possibility* that the applicant's project will fail. This falls far short of the requirement of the Administrative Procedure Act that the intermediate decision procedure be used unless the due and timely execution of an agency's functions *imperatively* and *unavoidably* requires its omission.

These words "imperatively" and "unavoidably" mean what they say. As Congressman Walter, Chairman of the Sub-committee that considered the bill that became the Administrative Procedure Act said in reporting it to the House of Representatives, the intermediate decision procedure "may be wholly omitted where the execution of agency functions make it impossible." S. Doc. No. 248, 79th Cong. 2d Sess., p. 367. As the Attorney General said in his statement on the bill, the omission of the intermediate decision was permitted "in the emergent instances indicated." *Ibid.*, p. 229. The "emergent instances" were those to which Mr. Clyde B. Aitchison, then a member of the Interstate Commerce Commission, testified in hearings on the bill, i.e., orders

establishing priority in the use of coal cars, during war time, orders embargoing shipments to a given point or requiring shippers' routing instructions to be disregarded in the event of flood, orders granting emergency rate changes immediately after hearings and argument at which the Commission itself presided. *Ibid.*, p. 106, 116, 117.

What was the emergency, what was the imperative and unavoidable necessity in this case? The majority opinion of the Court of Appeals summarily holds that what it describes as a finding that "the whole proposal [of applicants] might fail through exercise of suppliers' options to cancel their obligations if the project were not certified by December 31" was supported by substantial evidence and "warranted omission of the intermediate decision." *Infra*, p. 7a. Its only explanation of its holding is its footnote stating that the "record suggests that obtaining extensions beyond December 31 would have been touch and go, and if obtained at all, would have been at a higher cost." *Infra*, p. 7a, fn. 17. In fact the record does not so suggest. The suggestion was made by the Commission in its Brief to the Court of Appeals. It was based on a statement by counsel for applicants that the deadlines were not fixed by Coastal and on the fact that another applicant for a certificate in another proceeding failed to obtain extensions of options from gas suppliers. Indeed the Commission itself did not so read the record. In its Opinion 301 it said merely that it considered that "we should decide the merits of applicants' proposals rather than permit any delay in doing so to result *in the possible cancellation* of these supply contracts and

the *possible failure* of the projects on that account." *Infra*, p. 22a. (Emphasis supplied).

In fact the record suggests the contrary. As Judge Bazelon pointed out in his dissent, *infra*, p. 13a:

> "If it were our function to examine the record for the purpose of determining what justification existed for omitting the intermediate decision procedure, my reading of the record would tend to undermine rather than support the Commission's findings that omission was 'imperatively and unavoidably' required. The record shows that, though the gas supply contracts gave the suppliers an option to cancel if the project were not certificated by a certain date, the date in question had originally been July 1956 in some of the contracts and had been extended. There is nothing in the record to show that the option date would not have been extended again. Nor was any evidence presented that the options to cancel would have been exercised if there were not a certificate by December 31, 1956. The possibility of cancellation, so far as appears from the record, never became more than a mere possibility. The Commission, indeed, found only that the contracts would 'be subject to cancellation,' *not that they would be cancelled.*"

Moreover, deadlines of December 31, 1956 were fixed in contracts entered into as late as October 15, 1956. On October 15 hearings were still in progress and applicants had not even completed their direct case. It was then perfectly obvious that certificates could not be issued by December 31 unless the intermediate decision procedure were omitted. Thus, in ordering its omission the Com-

mission allowed applicants to do precisely what it so piously said "we do not approve and will not countenance," *infra*, p. 22a, namely, "to fix and assert date deadlines within which time the Commission must act on applications for certificates of public convenience and necessity as a grounds or basis for waiver of the intermediate decision procedure." (R. 412).

We submit that the holding of the majority that the Commission properly omitted the intermediate decision procedure in this case is clearly wrong. It vitiates the provisions of Section 8(a) of the Administrative Procedure Act. It replaces substance with form and thereby gives administrative agencies *carte blanche* to ignore the requirements of the Act any time they please by simply uttering the magic phrase, "imperatively and unavoidably so requires." Such a holding cries for review by this Court.

The Violation of the Principle of Morgan v. U.S.

Congressman Walter, reporting the Administrative Procedure Act to the House of Representatives said:

> "The provisions of section 8 are designed to make it certain that those who sign decisions or decision papers are actually the people responsible for them, that the evidence and the arguments of the private parties are fully and fairly considered, that the views of agency personnel are not unduly emphasized or secretly submitted, and that the official record alone is the basis of decision." S. Doc. 248, supra, p. 366.

Having made a dead letter of those provisions insofar as they require an intermediate decision by the per-

son who hears the evidence and is familiar with the record, the majority of the Court of Appeals in the case at bar compounded the effect of its error and proceeded to deliver the *coup de grace* to the rest of the provisions of Section 8 by holding that Petitioner had been accorded a fair and substantial hearing by the Commission. The Court ruled that the time available between the close of hearings on November 28 and the Commission's decision December 28 was sufficient to permit the Commission to consider the evidence and resolve the contested issues.[2]

As Judge Bazelon shows in his dissent, a fair and substantial hearing was an "arithmetical impossibility." *Infra*, p. 16a. Twenty-two days after the intermediate decision procedure was omitted the Commission issued its opinion. Had the Commissioners done nothing else in that period but read the record and had they read it every day, including Sundays and Christmas day, each of them would have had to read between 600 and 700 pages a day. As Judge Bazelon concluded, "only by closing our eyes to reality can we hold that the Commission did" what the *Morgan* case requires it to do to give the substance of a hearing, namely, in the words of that case, "consider and appraise" the evidence. *Infra*, p. 16a.

In fact counsel for the Commission did not claim and the Court did not find that the Commission could

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[2] The majority says, infra, p. 8a, fn. 19, that the record was first certified to the Commission on November 16, 1956. This is incorrect. Nothing was certified to the Commission until after November 28. On November 16 the Examiner transmitted to the Commission only the motion for omission of the intermediate decision and the "remarks thereon." (R. 410).

have or did read the record.[3] Rather, the majority's rationale was as follows:

> "It is not for the courts, short of flagrant extremes, to tell the administrative agencies how long they must ponder before coming to a decision. The time spent in considering the evidence cannot be held by us to be too little if it appears that the Commission has spent the time required to satisfy itself as to its findings and conclusions. We cannot say that either the statute or the Constitution was violated by the Commission in not consuming a longer time in considering and deciding the case."

This rationale wholly begs the question. Petitioner did not complain that the Commission did not spend enough time *pondering* the evidence. It complains that in the time available *the Commission* could not have done that which it obviously must do *before* it ponders the evidence, namely,[4] *examine* the evidence and *familiarize* itself with it.

It is no answer to say, in the words of the majority, *infra*, p. 9a, that errors, "whether induced by haste

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[3] Counsel for the Commission took the position in Court that there was little practical need for the Commission to read most of the record in order to decide the case. *Infra*, p. 15a, fn. 4. This is a rather remarkable position in view of the fact that the Commission's order omitting the intermediate decision procedure, issued eight days after the hearings closed, recited that it was based upon "the entire record." (R. 412).

[4] The majority refers to "the vigorous dissent by Commissioners Connole and Kline [as emphasizing] the close scrutiny given by the Commission. Infra, p. 9a. Of more significance, as Judge Baselon noted, infra, p. 15a, is the fact that the opinion is 31 pages long and treats of many highly complex issues. It demonstrates both that someone gave "close scrutiny" to the record and that, in view of the time available, it was not the Commission.

or other factors, are always reviewable on appeal." This is clearly not so here. Since the Commission did not consider and appraise the evidence the court has no way of knowing what findings and conclusions the Commission would have made had it done so. There is therefore obviously no way for the Court to perform the only function it has on review of findings and conclusions—that of determining whether those based on the Commission's consideration and appraisal of the evidence are supported by substantial evidence.

In short, to say that the failure of *the Commission* to consider and appraise evidence can be corrected on appeal is to say that *the Court* can consider and appraise the evidence and make findings and conclusions thereon. This of course it cannot do. The reviewing Court's power is limited to examining the Commission's findings and conclusions in the light of the evidence considered, appraised and relied upon by the Commission to support them, and, if it finds them unsupported by substantial evidence, to lay bare the error and remand the case to the Commission to make new findings and conclusions. *F. C. C.* v. *Pottsville Broadcasting Co.*, 309 U. S. 134.

The majority, in closing its eyes to reality, deprives parties in administrative proceedings of their rights under the Administrative Procedure Act and the *Morgan* case. In effect the Court announces that it will not review a claim that he who decided did not hear so long as he who decided says that he heard.[6]

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[6] The majority of course reserved the right to review such claims in cases of "flagrant extremes." It does not indicate what it would consider flagrant. We are at a loss to imagine a case much more flagrant than this one.

Thus again, as it did in sustaining the omission of the intermediate decision procedure, the majority authorizes administrative agencies to convert rules of procedure that confer substantial and important rights into meaningless ritualistic forms. We submit that one of the greatest public duties of this Court is to prevent lower tribunals, often understandably too close to the trees to see the forest, from whittling away rights in order to achieve what they think just results in particular cases.

The Conditional Grant of Certificates

Perhaps the most significant and all-pervading vice in the opinion of the majority of the Court of Appeals is its holding, *infra*, p. 9a, that under Section 7(e) of the Natural Gas Act the Federal Power Commission may find that a certificate "is or will be required by the present or future public convenience and necessity" on the basis of information submitted to it *ex parte* and *dehors* the record in the proceedings. That this is the proposition established by the majority is easily demonstrated.

In the words of Judge Bazelon, *infra*, p. 17a:

> "In its Opinion No. 301, issued on December 28, 1956, the Commission found the applicants' proposals deficient in respects which made them inconsonant with public convenience and necessity. It held that the applications as they stood would have to be denied. Instead of denying them, however, it offered the applicants an opportunity to file new tariffs, new service agreements and a new financing plan along lines suggested in the opinion and it proceeded to issue certificates of public convenience and necessity conditioned upon the filing of such revised proposals."

Specifically, for example, the Commission found that the arrangement for transportation for the power companies "was subject to such basic defects . . . that it cannot be approved as it stands"; that the rates for transportation were "substantially below the cost of rendering the transportation service"; and that "other classes of service would be required by reason of the [transportation] arrangement to assume a proportion of the cost of operations in excess of their fair share." *Infra,* p. 40a. Furthermore, and of vital significance, the Commission found that "although the evidence is not sufficient to enable a determination of precisely what the proper rate should be, it sufficiently supports the conclusion that Houston Gas (sic) presently proposed rates are not designed to require each class of service to bear its proper share of costs." *infra,* p. 43a.

In short, the Commission found that on the record made it could not certificate Applicants' project. In these circumstances Section 7(e) of the Natural Gas Act in terms required the certificates to be denied.[6] Such a denial would of course be without prejudice to the filing of new applications. For the purpose of this Petition only we assume *arguendo* that the Commission, despite the plain language of Section 7(e), was not required to finally deny the applications. The question then is: What other action could it have taken?

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[6] The relevant part of Section 7(e) read as follows:

"[A] certificate shall be issued . . . if it is found . . . that the proposed service, sale, operation, construction . . . is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require."

We submit that the only other action permissible was to order the record reopened and further hearings held for the purpose of permitting Applicants to introduce evidence to show that they could in fact "overcome the deficiencies" of their projects and "bring [them] into conformity with the Act's standards." This the Commission did not do. Rather, exercising what it conceived to be its power under the last sentence of Section 7(e), it granted the certificates subject to future compliance by Applicants with various conditions. The Commission sought to justify this action in the following terms. After discussing the various defects of the applications it said: *Infra,* p. 39a.

> "Thus, although the conditions which we shall impose are substantial, the only alternative is to deny the applications. The course we shall pursue leaves open the possibility that applicants can overcome the deficiencies which we shall point out and thereby attain the objective of paramount concern to all in this case—natural-gas service at reasonable rates to Florida consumers, under circumstances which protect all substantial interests relating thereto.'"[7]

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[7] In calling the course it adopted the "only alternative" to denial the Commission blandly ignored the fact that it can and does order proceedings reopened to adduce further evidence as an alternative to denial of applications. See Transcontinental Gas Pipe Line Corp., et al., Docket G-12059 et al., Order Reopening a Part of Proceeding, issued November 29, 1957; Alabama Tennessee Natural Gas Company, Docket G-585, Order of February 9, 1950, 9 F.P.C. 461. In the *Alabama* case, as here, the Commission found the tariffs of an applicant for a certificate unsatisfactory. There, as here, it required the filing of new tariffs as a condition to certification. There, but not here, it reopened the proceedings to take evidence on the issue whether the new tariffs were satisfactory.

Apart from the error of the Commission in thus using its power to condition certificates "to convert an invalid proposal into a valid one," *infra*, p. 18a, which we do not argue in this Petition, the vice in the course pursued is pointedly illustrated by an examination of just two of the conditions imposed. The Commission ordered Houston to file within 30 days tariffs for "firm sales for resale, interruptible sales, and for transportation . . . commensurate with the cost of service determined on a reasonable allocation of costs between these services in accordance with usual Commission standards and based on a rate of return of not in excess of 6%." *Infra*, p. 58a. Similarly, the Commission ordered Coastal to file within 30 days a tariff "for charges by Coastal for services to Houston Gas based on a cost-of-service formula," with "separate charges (a) for gas sold by Coastal to Houston Gas and (b) for gas transportation service rendered to Houston Gas with respect to gas transported to Florida Power & Light and Florida Power. Such separate charges shall be based on a reasonable allocation of costs between the two services in accordance with the usual Commission Standards." *Infra*, p. 59a

It is clear from what we have seen that Applicants' compliance with these and the other conditions imposed by the Commission was a *sine qua non* for certification of their project. It follows that among the issues that had to be resolved before certificates could be granted were the issues whether Applicants had in fact complied with the conditions. It is equally clear that compliance *vel non* was not something capable of determination by the mere examination of filed tariffs. As the Commission said in *Atlantic Seaboard Corp., et al.*, 11 F.P.C. 43, 53, 54, the "proper allocation of

costs is . . . one of the most controversial of issues." In "the final analysis the allocations of cost . . . are and must be largely dictated by informed judgment." Again, in the same opinion the Commission said, quoting this Court in *Colorado Interstate Gas Co.* v. *Federal Power Commission,* 324 U.S. 581, 589: "Allocation of costs is not a matter for the slide-rule. It involves judgment on a myriad of facts. It has no claim to an exact science." In view of this it is obvious that the issue whether particular rates are commensurate with the cost of service reasonably allocated is one that can be resolved only after hearing.

Therefore, under the express provisions of Section 7 of the Natural Gas Act these issues could only be resolved from evidence adduced on the record at a hearing. Nevertheless, the Commission did not reopen the Record and held no further hearings. Instead, on February 21, 1957 it simply issued an order, relieving Applicants from compliance with some conditions and finding compliance with others.

To illustrate, the order of February 21, recites that Applicants had filed new tariffs together with "various supporting materials" and "cost of service data," *infra,* p. 69a, 73a, and orders the tariffs "accepted for filing as in conformity" with the rate conditions imposed in Opinion and Order 301, *infra,* p. 86a. The filings so accepted by Respondent were concededly made *ex parte* and *dehors* the Record. Petitioner was given no opportunity even to comment on them, and its Petition for Re-hearing of the Order of February 21, 1957 was not even allowed to be filed, *infra,* p. 93a. As Petitioner protested in that Petition for Re-hearing (R. 585):

"The Houston and Coastal filings in purported compliance with Paragraphs (B), (B)(1), and (C) of Opinion and Order No. 301 were not served on the parties and are not part of the record upon which the Commission could act. Those paragraphs required Applicants to establish rate schedules based on a reasonable allocation of costs in accord with usual Commission standards. In the Order of February 21, 1957, the parties are summarily told by the Commission that such cost of service data has been submitted. However the person or persons who prepared the data have not been presented for cross-examination and no opportunity has been given or even offered to probe the reasonableness of their allocations. Despite the lack of these fundamental requirements for a fair hearing, the Commission, with some trepidation, accepts the filings. By so doing, it is submitted, the Commission acted without substantial evidence in the record to support its decision and failed to provide a fair hearing as required by law."

The majority of the Court of Appeals affirmed the Commission's *ex parte* order of February 21, 1957, on the ground that "The conditions only resolved issues raised, argued and briefed in the hearing." *Infra*, p. 9a. This argument wholly misses the point.

The issues Petitioner raised in this aspect of the case were *not* the propriety of the Commission's findings on the record that the public convenience and necessity required applicants to modify their proposals in particular ways. The issues Petitioner raised were (1) the propriety of granting certificates when the record did not show that applicants were willing or able to make the modifications required and (2) the propriety of compounding this error by subsequently finding *ex parte* that the required modifications had

been made—that there had been compliance with the conditions—on the basis of applicants' statements and filings *dehors* the record.

For example, Petitioner did not contend that the Commission's findings in its Opinion 301 that Applicants' rates were improper were not supported by the record. Quite the contrary. Petitioner, alone of all the parties to the proceedings, introduced evidence which showed (1) that Applicants' rates were not commensurate with the cost of service and (2) what rates would be commensurate with the cost of service. (R. 99 et seq., 375-386). It argued in its Brief to the Commission that certificates could not be granted unless Applicants fixed rates that were commensurate with the cost of service. There were thus in issue throughout the proceedings both the question (1) whether Applicants' rate *should be* commensurate with the cost of service and (2), if so, what rates *would be* commensurate with the cost of service.

In Opinion 301 the Commission (1) concluded that the public convenience and necessity required Applicants to fix rates that *were* commensurate with the cost of service, (2) found that the rates they had fixed *were not* commensurate with the cost of service, and (3) found that the evidence was not sufficient to enable it to determine what rates *would be* commensurate with the cost of service. It therefore conditioned the certificates it granted by ordering applicants to fix new rates commensurate with the cost of service determined on a reasonable allocation of costs between services.

From the foregoing it is perfectly clear that (1) Opinion and Order 301 did not resolve all of the issues

in the case, but on the contrary, left for future resolution the issue, *inter alia,* whether whatever rates Applicants might subsequently file were commensurate with the cost of service reasonably allocated, and (2), in the Commission's view, the resolution of that issue by a finding that they were was a *sine qua non* for certification. It is also perfectly clear that the Order of February 21 did resolve that issue. It found, *infra,* p. 86a, 87a, that Applicants' newly filed tariffs were "in conformity to paragraphs (B) and (B)(1) [and (C)] of the Commission's order issued December 28, 1956," i.e., that they were commensurate with the cost of service reasonably allocated. It is the resolution of that issue on the basis of *ex parte* filings *dehors* the record that Petitioner complains of.

This case is clearly distinguishable from both of the cases upon which the majority relied. In *C.A.B.* v. *State Airlines,* 338 U.S. 572, State, an applicant for a certificate, contended that it had been deprived of a fair hearing because a competing applicant for a certificate had been awarded one over a somewhat different route than that for which it had applied. This Court held that State had in fact had an opportunity to contest the fitness of its competitor to operate over the route awarded it and that the Board's conclusion that the competitor was not only fit but more fit than State "was supported by substantial evidence." 338 U.S. at p. 582. In contrast, in this case Petitioner was given no opportunity to challenge or test applicants' claim of compliance with the Commission's rate requirement for certification and the Commission itself held that *the evidence of record*

was not sufficient to enable it to determine what rates met its requirements.

In *Interstate Power Co.* v. *Federal Power Commission,* 236 F. 2d 372, 383 (C.A. 8th, 1956) the parties to rate proceedings before the Commission introduced elaborate evidence on the issue of the proper rate zones to be fixed. The trial examiner recommended particular zones. On exceptions to his intermediate decision the Commission rejected his zones, as well as the various zones proposed by the parties and fixed different zones. On judicial review it was contended that the Commission could not do this without reopening the record for further hearings. The Court held that further hearings were unnecessary because "the evidence . . . taken in sixteen days of hearing and including some 2,000 pages of testimony and 46 exhibits, many of which are quite voluminous, was sufficient to enable the Commission to establish just and proper zone lines." In short, contrary to the case here, the Commission there resolved the zoning issue only on the record after hearing, and there was substantial evidence to support the particular resolution it made.

The case upon which the Commission principally relied in Court, *Signal Oil and Gas Co.* v. *Federal Power Commission,* 238 F. 2d 771, 775 (C.A. 3rd, 1956) is equally inapposite. In that case the Commission conditioned Signal's certificate of public convenience and necessity to require the filing of a rate of 10¢ per MCF for gas sold pursuant to the certificate. Signal challenged the legality of the condition. The Court said that the "question of the rate to be fixed was gone into at length in the proceedings before the Commission." It then reviewed the evidence and held

that "substantial evidence supports the Commission's finding that public convenience and necessity required the certificate to be conditioned on a 10¢ rate." The point in the case at bar, i.e., the necessity of further hearings to determine whether there was in fact compliance with the condition, was not in issue because it was obviously not necessary to hold a hearing to determine whether Signal in fact filed a 10¢ rate.

In affirming the Commission's procedure in this case respecting the conditions found to be a *sine qua non* for certification, the majority establishes a rule that the Commission's power to condition certificates is the power to grant certificates without the hearing required by Section 7(c) of the Natural Gas Act. Under the Court's holding the Commission may in any case deny a certificate because it is not in the public interest, state in its order of denial what would be in the public interest, invite the applicant to amend its application accordingly, and then grant the amended application without hearing. All it need do is be careful, as it was careful in this case, to choose the correct language. Its initial denial after hearing must be called a grant subject to conditions. Its subsequent grant without hearing must be called a finding that the conditions have been met.

This cannot be the result the Congress intended or the Natural Gas Act it passed permits. If the power to attach conditions to the issuance of certificates or to the exercise of the rights granted thereunder is not to be used to make what Judge Bazelon called "a farce of administrative procedure, *infra*, p. 19a, this Court must limit it to the power to require applicants to do particular and specific things which the Commission properly finds *on the record* to be required

in the public interest, and which it can determine *on the record* to have been done or not.

The Unfair Competition With Petitioner

Discussing Petitioner's claim that the Commission was bound to make findings on Petitioner's allegation that the arrangement for the sale and transportation of gas for the power companies was violative of the public policy of the United States expressed in the anti-trust laws, the majority of the Court of Appeals said:

> "Petitioner claims the proposal was infected by a violation of the unfair trade practices and anti-trust laws. The price to be paid by the power companies for the delivered gas was composed of two elements; the price paid direct to the suppliers for the gas itself, and the price paid to Houston for transporting it. The transportation price was subject to Commission jurisdiction, but the gas price was not. The gas price was initially set at such a level that it, plus the transportation price, was competitive with fuel oil. The gas price was subject to an escalator clause, and would go up or down in a fixed proportion to the amount fuel oil prices went up or down. That is, the gas price was based, not on cost, but upon fuel oil prices. It may not be lawful to make sales at prices based not on cost but on a competitor's price, 'for the purpose of . . . eliminating a competitor.' But even if not, the acts complained of occurred in an independent contract between the power company and its suppliers, none of whom are subject to Commission jurisdiction. Moreover, the price arrangement may in the light of factors not now before us be found reasonable. In these circumstances the public interest is best served by awaiting rather than anticipating, the occurrence of a violation which can be dealt with adequately

only in a proceeding in which the alleged violator is a party." *Infra*, p. 6a.[8]

There are three principal defects in this holding. In the first place, what the Court called "the acts complained of" did not occur "in an independent contract between the power company and its suppliers." The uncontroverted evidence shows that Houston initiated the discussions for the purchase of gas by the power companies, that Houston suggested the arrangement for purchase in the field directly from suppliers and for transportation by Applicants, that the price of the gas in the field and the rate for transportation were arrived at in joint negotiations among Houston, the power companies and the suppliers, and that, as the Commission agreed, *infra*, p. 42a, those rates were designed to assure that the delivered price of gas would always be below that of oil.

In the second place, it is not true that the contracts between the power companies and their suppliers are not subject to the Commission's jurisdiction. As the Court itself said: "The Commission . . . thought the present facts did not warrant deciding whether it had jurisdiction over the power company or its suppliers, and we are not inclined to disagree." *Infra*, p. 6a.

In the third place, as the Commission said, the arrangement among applicants, the power companies and their suppliers is the "key to applicants'

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[8] Even under the Court's view that there were "independent" contracts between the power companies and their suppliers, it is to be noted that the power companies were parties to the proceeding and that those "independent" contracts were introduced in evidence in support of certification.

proposals, . . . the backbone of their proposed projects." *Infra*, p. 39a. In these circumstances, even if we assume that the Commission has no regulatory jurisdiction over the power companies or their suppliers, it must nevertheless decide whether that arrangement is contrary to the public convenience and necessity in the light of the anti-trust laws. *McLean Trucking Co.* v. *U. S.*, 321 U.S. 67. It cannot, as the Court of Appeals suggested, defer to some other time and some other proceeding the question whether that arrangement "may . . . be found reasonable." As was held in *Pittsburgh* v. *F. P. C.*, 237 F. 2d 741, 755 (C.A.D.C., 1956), the evils of which Petitioner complains can only be prevented by "administrative supervision at the very genesis of the project." Corrective action at a later time would not repair the damage to Petitioner in the meantime. Moreover, to quote the Commission, the contracts between the power companies and their suppliers provide for cancellation in the event the "Commission asserts any jurisdiction" over the suppliers. *Infra*, p. 44a. Cancellation, whether under these provisions or as a result of a subsequent anti-trust proceeding in another forum, would "leave both applicants with large amounts of unused capacity which, to avoid possible economic disaster, would necessitate their finding comparable markets and gas supply, or shifting to present markets a cost load which they cannot reasonably be expected to support." *Infra*, p. 41a.

In these circumstances the Commission was bound to consider *and make findings on* the issue of violation *vel non* of the policy of the anti-trust laws. The Commission's general finding that "such arguments, contentions and objections advanced by any party to

this proceeding as have not been specifically disposed of herein have been considered but are without substantial support in the record or reasonable basis in law," *infra*, p. 58a, is not enough. Section 8(b) of the Administrative Procedure Act requires *all* decisions to "include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all material issues of fact, law, or discretion presented on the record."

We submit that the majority's holding that the Commission properly failed to consider this issue is clearly wrong. A wrong holding in a matter of as grave national importance as the policy of the anti-trust laws and its relation to the exercise by the Federal Power Commission of its duties in the administration of the Natural Gas Act requires correction by this Court.

CONCLUSION

We submit that we have shown that the majority of the Court of Appeals affirmed orders of the Federal Power Commission that deprived Petitioner of substantial legal rights. Moreover, of equal or even greater significance, the majority's affirmance authorizes the Commission to ignore the requirements of the Natural Gas Act, the Administrative Procedure Act and the policy of the anti-trust laws.

The opinion of the majority frankly recognizes that the proceedings before the Commission were not in accord with "usual procedures." It condones what it calls their "abridgement" because it thought "the injury to petitioner is not likely to be substantial," because "we see no *important* issue on which petitioner was not heard," and because it thought the "need for

speed" important to the "vital economic interests of Florida." *Infra*, p. 10a, emphasis supplied.

As for the injury to Petitioner, the uncontroverted evidence shows that its members would lose revenues of nearly $20,000,000 per year, 49.7% of their total annual revenues. (R. 115 *et seq.*) We think this substantial. As for the importance of the issues on which Petitioner was not heard, how can it be said, for example, that the issue whether applicants' rates for various classes of service were commensurate with the cost of service determined on a reasonable allocation of costs was not an important issue? The primary purpose of the Natural Gas Act was to assure that rates for natural gas to ultimate consumers be just, reasonable and non-discriminatory, *F. P. C.* v. *Hope Natural Gas Co.*, 320 U.S. 591. In this case the Commission refused to certificate applicants' project under their initially proposed rates because it found on the Record that those rates would require ultimate consumers "to assume a proportion of the cost of operations in excess of their fair share," *infra*, p. 41a, and that it could not determine what rates would be commensurate with their fair share of that cost. *Infra*, p. 43a.

The Court of Appeals thought this a hard case. The Supreme Court of the United States should not permit it to make bad law. In fact it has already begun to make bad law. After this Petition went to the printer the Commission, on March 26, 1958, issued a certificate in the *Matters of El Paso Natural Gas Company*, Dockets G-11797 and G-12580. No doubt encouraged by the majority's blessing of its action in this case, the Commission there, despite its high sounding warning here, *supra*, p. 19, permitted the applicant to fix con-

tractual date deadlines and then assert them as a ground for omission of the intermediate decision procedure. Dockets G-11797, G-12580 were, like those here, consolidated proceedings on two separate applications for certificates of convenience and necessity. On February 24 the Commission omitted the intermediate decision procedure in *both* proceedings on the ground that commitments to purchase some of the bonds proposed to be issued to finance *only* the first application could be cancelled if a certificate were not issued by March 31, 1958. Said the Commission: "[I]t appears probable that in such event El Paso would, on account of the Memphis decision [*Memphis Light, Gas and Water Division et al.* v. *F. P. C.*, 250 F. 2d 402 (C.A. D.C., 1957) cert. granted, 335 U.S. 938] be unable to renew or extend the bond purchase agreements. [Therefore,] the public interest requires that . . . we decide the merits in Docket G-11797 rather than permit a delay to result in *possible expiration* of these bond purchase agreements and the *possible failure* of the project in this docket on that account." (Emphasis supplied). It is to be noted parenthetically that this Court apparently does not agree that the *Memphis* decision would prevent the financing of pipe lines. Despite cries of imminent disaster it denied motions to advance the case for argument.

The Commission remanded the second proceeding to the examiner because "the financing arrangements in this [second] docket do not necessitate our acting immediately. [W]e think it prudent [and] desirable [to make] use of this extensive record to avail ourselves of determinations by the presiding examiner on the above [discussed] major areas of disagreement and such other issues as are involved in this case." The

examiner was directed to make his determinations "in the detail not feasible for us." This statement makes clear that the Commission erroneously thinks it has discretion to omit the intermediate decision procedure even though there is no necessity that it act immediately. In fact it would have been unlawful to omit the intermediate decision procedure on the second El Paso application, just as it was unlawful to omit it on the first El Paso application and in this case.

WHEREFORE, Petitioner prays that this petition for a writ of certiorari be granted.

Respectfully submitted,

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April 9, 1958

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 13,833 and 13,952

FLORIDA ECONOMIC ADVISORY COUNCIL, *Petitioner*,

v.

FEDERAL POWER COMMISSION, *Respondent*,

COASTAL TRANSMISSION CORPORATION, HOUSTON TEXAS GAS AND OIL CORPORATION, FLORIDA RAILROAD AND PUBLIC UTILITIES COMMISSION, FLORIDA DEVELOPMENT COMMISSION, *Intervenors*.

On Consolidated Petitions to Review Orders of the Federal Power Commission

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Decided December 4, 1957.

Mr. Bryce Rea, Jr., with whom *Mr. Donald E. Cross* was on the brief, for petitioner. *Mr. Edgar Watkins* also entered an appearance for petitioner in No. 13,952.

Mr. Howard E. Wahrenbrock, Solicitor, Federal Power Commission, with whom *Messrs. Robert Lee Russell*, Assistant General Counsel, Federal Power Commission, and *Oscar Earl Reed*, Attorney, Federal Power Commission, were on the brief, for respondent. *Mr. Willard W. Gatchell*, General Counsel, Federal Power Commission, also entered an appearance for respondent in No. 13,833.

Mr. Leon M. Payne of the bar of the Supreme Court of Texas, *pro hac vice*, by special leave of Court, with whom *Mr. Dale E. Doty*, was on the brief, for intervenor Coastal Transmission Corporation, argued for intervenors Coastal

Transmission Corporation, and Houston Texas Gas and Oil Corporations.

Messrs. Theodore Rinehart, Dale E. Doty, Norman E. Duke and *Robert M. Scott* were on the brief for intervenor Houston Texas Gas and Oil Corporation.

Mr. R. Y. Patterson, Jr., with whom *Messrs. Cecil A. Beasley, Jr.*, and *Eugene B. Thomas, Jr.*, were on the brief, for intervenor Florida Railroad and Public Utilities Commission.

Messrs. Cecil A. Beasley, Jr., and *Eugene B. Thomas, Jr.*, were on the brief for intervenor Florida Development Commission.

Before BAZELON, FAHY and BURGER, *Circuit Judges.*

BURGER, *Circuit Judge:* This is a petition to vacate Federal Power Commission orders approving a plan to pipe natural gas to Florida.[1] Petitioner is an association of various organizations engaged in the petroleum product (chiefly fuel oil) business, whose economic activities will be adversely affected by competition of natural gas.[2] Opposing petitioner in this court are respondent Federal Power Commission and four intervenors; *viz.*, the two pipeline companies who jointly propose to bring natural gas to Florida,[3] and two official agencies of the Florida state government.[4]

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[1] Florida (except the northernmost parts) is the last remaining state of comparable size and importance without a supply of natural gas. It is dependent almost entirely on petroleum products (chiefly fuel oil) for its power needs.

[2] One of the purposes for which petitioner was organized was "to fight this case."

[3] Coastal Transmission Corp., and Houston Texas Gas & Oil Corp.

[4] Florida Railroad and Public Utilities Commission, and Florida Development Commission. These agencies argued strenuously in favor of the pipeline, because it would favor industrial development in Florida, and because it would reduce Florida's dependence upon a single fuel, which could, in emergencies, be cut off.

Houston and Coastal, the two pipeline companies, desired to build and operate a natural gas pipeline running from Texas and Louisiana fields along the Gulf shore, and down the Florida peninsula to Miami. Coastal would buy gas from various Texas and Louisiana suppliers, and carry it to Baton Rouge. Houston would buy the gas from Coastal, pick it up in Baton Rouge, and carry it to Florida, where it would be resold to Houston's customers. This plan of sale and resale accounted for 40% of the gas to flow through the pipeline. The rest of the gas was to be merely transportation gas, not resale gas. That is, two Florida power companies[5] would buy gas direct from suppliers in the field, and Coastal and Houston would merely transport the gas for the power companies.[6] The power companies would pay Houston for this transportation service, and Houston would reimburse Coastal for its share of the costs.

Hearings were begun on July 9, 1956, before a Commission hearing examiner, to determine whether the proposal merited a certificate of public convenience and necessity.[7] Petitioner, having been granted leave to intervene, actively participated in these hearings. The hearings ended on November 28. On December 6, the Commission, concluding there was a need for haste, called for briefs and oral arguments from the parties, including petitioner, and on December 28 decided the case itself[8] without any intermediate decision by the hearing examiner. The decision granted the certificate, subject to certain conditions. Some of these conditions were later modified or removed without petitioner being heard.

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[5] Florida Power & Light Co., and Florida Power Corp.

[6] In so doing the power companies and their suppliers could avoid Commission jurisdiction, and hence supervision of their activities.

[7] Section 7(c) of the Natural Gas Act, 15 U.S.C. § 717(c).

[8] F.P.C. Opinion 301, decided three to two. One of the dissenters later joined the majority.

Petitioner's attempts to persuade the Commission to change its mind, to be heard further, and to intervene in subsequent proceedings, were denied, and petitioner appealed to this court.* Its claims fall into two categories, substantive and procedural. Substantively, it claims the Commission's decision should be reversed (1) because not based on substantial evidence; (2) because there was no power to attach curative conditions to a defective proposal; and (3) because certain key issues were raised before but not decided by the Commission. Procedurally, petitioner claims it was denied a fair hearing in that (1) the intermediate decision by a hearing examiner was omitted; (2) the whole proceedings after the hearings were completed were infected by undue haste; and (3) petitioner should have been heard when the conditions were imposed on the pipeline companies, and later when they were relaxed. We find none of petitioner's contentions of sufficient merit to warrant reversal.

I The Alleged Substantive Errors

Public Convenience. Petitioner claims there was no substantial evidence to support the Commission's decision that the proposal, as modified by conditions, was required by public convenience and necessity. We need not dwell on this, for we find in a voluminous record ample evidence supporting this conclusion. The pipeline will, for the first time, bring natural gas to peninsular Florida, and will reduce Florida's almost complete dependence on fuel oil. Florida wants the pipeline, and obviously needs it. Indeed, it would be fair to argue that aside from the mechanics, public convenience and necessity are self-evident. It is true that the finding of public convenience and necessity was conditioned on certain deficiencies being corrected, but, as conditioned, the finding is supported by substantial evidence.

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* 15 U.S.C. § 717r(b).

Conditions. Next, petitioner questions whether the Commission has authority to transform a defective proposal[10] into a valid one by the addition of curative conditions. The argument is made that the Commission may attach conditions to valid proposals, but not to invalid proposals such as the present one would be, but for the conditions. It is sufficient to say that the Natural Gas Act specifically authorizes the grant of a certificate subject to "such reasonable terms and conditions as the public convenience and necessity may require."[11] We see no error here.

Suppliers' Rates. Petitioner claims the Commission should have held a rate hearing to determine the lawfulness of the rates to be charged by the gas suppliers. But this inquiry may be resolved in a rate proceeding rather than in a proceeding for a certificate of public convenience and necessity, and the Commission did not abuse its discretion in declining to consider the matter in the instant proceeding.[12] The rates are subject to the Commission's continuing jurisdiction, and, whenever sufficient reason appears, they may be taken up. Petitioner cites *Pittsburgh v. F.P.C.*[13] as requiring the Commission to consider these rates now. That case is not applicable because future correction of the alleged defects was not possible under the circumstances presented in that case. Here, the rates in question may always be corrected, if need be.

The Power Companies. Petitioner claims that one of the power companies and its suppliers fall under Com-

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[10] The Commission found the proposal defective as it then stood, in respect to transportation gas arrangements and financing plans. The Commission found no disqualifying inadequacy in respect to gas supply, markets, facilities and economic feasibility.

[11] 15 U.S.C. § 717f(e).

[12] See Panhandle Eastern Pipe Line Co. v. F.P.C., 97 U.S. App. D.C. 304, 169 F.2d 881 (1948), *cert. denied*, 335 U.S. 854.

[13] Pittsburgh v. F.P.C., 99 U.S. App. D.C. 113, 237 F.2d 741 (1956).

mission jurisdiction, and must be certificated. The assertion is that the matter must be decided now, and not later, because it is possible that certification of the power company or its suppliers would lead to cancellation of the power company's promise to use 20% of the capacity of the pipeline, and without this promise, the basis of the grant of the certificate would fall. It is true that the original contract between the power company and Houston contained a cancellation clause which lends color to petitioner's assertion that the danger of cancellation would be great if the Commission did exert jurisdiction. But this cancellation clause no longer exists; it has been deleted in accordance with the Commission's conditions. The Commission therefore thought the present facts did not warrant deciding whether it had jurisdiction over the power company or its suppliers, and we are not inclined to disagree.

Unfair Trade Practices. Petitioner claims the proposal was infected by a violation of the unfair trade practices and anti-trust laws. The price to be paid by the power companies for the delivered gas was composed of two elements; the price paid direct to the suppliers for the gas itself, and the price paid to Houston for transporting it. The transportation price was subject to Commission jurisdiction, but the gas price was not. The gas price was initially set at such a level that it, plus the transportation price, was competitive with fuel oil. The gas price was subject to an escalator clause, and would go up or down in a fixed proportion to the amount fuel oil prices went up or down. That is, the gas price was based, not on cost, but upon fuel oil prices. It may not be lawful to make sales at prices based not on cost but on a competitor's price, "for the purpose of . . . eliminating a competitor."[14] But even if not, the acts complained of occurred in an independent contract between the power company and its suppliers, none of whom are subject to

[14] See, *e.g.* 15 U.S.C. § 13(a).

Commission jurisdiction. Moreover, the price arrangement may in the light of factors not now before us be found reasonable. In these circumstances the public interest is best served by awaiting, rather than anticipating, the occurrence of a violation which can be dealt with adequately only in a proceeding in which the alleged violator is a party.

II The Alleged Procedural Errors

There remains the question whether petitioner was accorded an opportunity to be heard, and to have its contentions considered.

Omissions of the Intermediate Decision. Ordinarily, a hearing examiner hears the evidence, and makes findings of fact and a recommended conclusion; the Commissioners then pass upon the recommendations. But this procedure, while desirable and usually followed, is not inflexibly required. Section 8(a) of the Administrative Procedure Act[16] provides that the intermediate decision may be omitted "in any case in which the agency finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires." The Commission found that unless a decision were reached by December 31, 1956, the whole proposal might fail through exercise of suppliers' options to cancel their obligations if the project were not certified by December 31.[16] There was substantial evidence to support this finding.[17] The Commission's holding that

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[16] 5 U.S.C. § 1007(a).

[16] There were 47 contracts with 33 suppliers of gas, each with this termination option.

[17] So sought after is natural gas that the pipeline companies were fortunate to secure contracts for as much gas as they did. The record suggests that obtaining extensions beyond December 31 would have been touch and go, and if obtained at all, would have been at a higher cost. Our dissenting colleague says "The lack of basis for the Commission's action [in omitting the intermediate procedure] is shown by subsequent events. The Commission found that the contracts would be subject to cancellation 'unless *final* action is taken by the

this circumstance warranted omission of the intermediate decision was not an abuse of discretion.[18]

The Expedited Proceedings. Petitioner claims that two defects resulted from the speed in which the hearings were concluded and a decision reached. First, it claims it had an unduly short amount of time in which to brief and argue its case. After the hearings had been in progress for over four months, with petitioner present and actively participating, petitioner on December 6 was asked to submit briefs by December 15 (actually December 17, as the 15th was a Saturday), and on December 13 was asked to submit oral argument on December 21. We do not find this so short a time, considering the need for dispatch, as to amount to a denial of substantial rights. There is no showing that due to the speed, petitioner overlooked any important points or was otherwise adversely affected.

Second, petitioner complains that the Commission decided the case too fast; that in the time available the Commissioners could not have read all the evidence and pondered all the issues.[19] It is not for the courts, short of

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Commission prior to December 31, 1956.'" He then correctly points out that there was in fact no "final action" for almost three months after December 31, and yet none of the suppliers cancelled their contracts. This, he implies, shows there was no real danger of cancellation. This does not follow. The fact that the time limit was not met and no one cancelled does not show there never was any danger of this happening. Moreover, it would appear that the time limit was met. The contracts were conditioned not, as suggested, on "final action" being had by December 31, but upon "the obtaining . . . on or before December 31, 1956 . . . of a Certificate of Public Convenience and Necessity." The certificate was in fact granted on December 28.

[18] See R.C.A. Communications Inc. v. F.C.C., 99 U.S. App. D.C. 147, 238 F.2d 24 (1956), cert. denied, 352 U.S. 1004; cf. Channel 16 of Rhode Island v. F.C.C., 97 U.S. App. D.C. 178, 229 F. 2d 229 (1956); Chetin Towing Corp. v. F.P.C., No. 14,021, D.C. Cir., Nov. 1, 1957, wherein we held that the intermediate decision procedure could not be abridged in an application not involving an initial license.

[19] The record was first certified to the Commission on November 16, and briefs and oral argument were submitted by December 21. The decision was handed down on December 28.

flagrant extremes, to tell the administrative agencies how long they must ponder before coming to a decision. The time spent in considering the evidence cannot be held by us to be too little if it appears that the Commission has spent the time required to satisfy itself as to its findings and conclusions. We cannot say that either the statute or the Constitution was violated by the Commission in not consuming a longer time in considering and deciding the case. The vigorous dissent by Commissioners Connole[10a] and Kline serves to emphasize the close scrutiny given by the Commission. Errors, whether induced by haste or other factors, are always reviewable on appeal.

Conditions. The Commission found that the plan was defective as it then stood, but it found that if certain conditions were complied with, the defects would be cured. It granted the certificate subject to these curative conditions, without hearing what petitioner had to say about them. Petitioner says it should have been heard, because the conditions transformed the proposal into an entirely new proposition.[11] We think not. The conditions only resolved issues raised, argued and briefed in the hearing. They involved no surprises except insofar as they may have gone farther or not so far as petitioner would have wished.[12] For example, in the hearing, all parties, including petitioner, were heard on the issue of how much equity capital should be required. Later, the Commission decided the level should be 15%, and conditioned the grant

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[10a] In February, 1957, Commissioner Connole joined the majority in approving the application.

[11] McClanahan Broadcasting Co. v. F.C.C., 99 U.S. App. D.C. 288, 239 F.2d 19 (1956), cert. denied, 353 U.S. 913. There was allowed further hearings between steps, modifications of the construction permit was so substantial as to amount to issuance of a new and different permit, in regard to which McClanahan had not yet been heard. See C.A.B. v. Modern Airlines, 366 U.S. 312 (1960), for a case upholding award of a certificate differing substantially from that sought.

[12] See Interstate Power Co. v. F.P.C., 324 F.2d 378 (8th Cir. 1963), cert. denied, 376 U.S. 967.

of the certificate on meeting this requirement. No useful purpose would have been served by reopening the proceedings to hear petitioner argue that 15% was not proper.

Petitioner also protests that the Commission, without hearing petitioner, later modified some of these conditions. The Natural Gas Act[n] grants the Commission discretion to modify its orders without further hearings. On this record, we see no important issue on which petitioner was not heard.

While petitioner's business will no doubt be affected by the advent of natural gas, both petitioner and the pipeline companies can do business in Florida[n] and both are needed to serve the growing population and expanding economy of Florida. The "injury" to petitioner is that it must share what has heretofore amounted to a power monopoly. Moreover, the injury to petitioner is not likely to be substantial. As petitioner's brief says, "as against the overall fuel needs of the State of Florida, the volume of gas brought in would be meager." In addition, the record discloses a legitimate need for expedition, and thus some abridgment of usual procedures would be justified. Of course, the need for speed, however important to vital economic interests in Florida, would not justify denial of protected rights of the petitioner. This record discloses nothing which warrants our disturbing the Commission's action and the orders of the Commission are

Affirmed.

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[n] 15 U.S.C. § 717r(a).

[n] The Commission's opinion stated "although it may be that [certain competitors] . . . may initially suffer economic losses, it reasonably appears that increased industrial and other activity in Florida resulting from the introduction of natural gas will yield offsetting benefits in the long run. We therefore conclude that the need and desire of the public in Florida for natural gas turns the scales against these competing interests."

Dissenting Opinion by Circuit Judge Bazelon to Opinion of Court Filed December 4, 1957.

Filed December 12, 1957

BAZELON, *Circuit Judge*, dissenting: It is in the public interest that the people of Florida receive natural gas service as expeditiously as possible. But hasty contrivance may make for a project of such doubtful feasibility as to delay rather than expedite the desired service. Moreover, a speedy conclusion, however desirable, is not to be achieved at the expense of procedural fairness. I would reverse the grant of these certificates because the Commission's procedure was unfair. The legality of feasibility of the certificated project are questions I need not reach as I view the case. Whatever doubts the record discloses as to those questions serve, however, to emphasize the significance of the procedural deficiencies.

Omission of Intermediate Decision Procedure

On December 6, 1956, after almost five months of hearings before a hearing examiner, in the course of which a record of some 20,000 pages was made, the Commissioner found "that unless final action is taken by the Commission prior to December 31, 1956, the gas purchase contracts of Coastal will be subject to cancellation, and unless the intermediate decision procedure is omitted, it appears that a decision by the Commission cannot be rendered before December 21, 1956." Accordingly, it ordered omission of intermediate decision procedure and undertook to "render final decision in the proceedings."

Section 8 of the Administrative Procedure Act, 5 U.S.C. § 1007, reflected in the Commission's Rules of Practice and Procedure, 18 C.F.R. §§ 1.30, 1.31, establishes the procedure by which administrative agencies are to decide proceedings before them. In general, it is contemplated that the officer who hears a case will render an initial decision, or, if the Commission itself renders the initial decision, the offi-

cer shall first submit a recommended decision. Prior to any initial or recommended decision, the parties shall file proposed findings and conclusions. Before final decision, the parties shall have the right to file exceptions to the initial decision. All rulings upon proposed findings or conclusions and upon exceptions are to be shown in the record.

This procedure gives reasonable assurance that the final decision of the agency will reflect the evidence produced before the hearing examiner and that issues fairly raised will have been considered and decided. It also produces an administrative record which is amenable to judicial review. The task we face in measuring the agency's final decision against 20,000 pages of evidence would have been immeasurably simplified had the issues been progressively sharpened at the various stages of the intermediate decision procedure. There can be no question that this procedure is generally desirable. There may, however, be occasional emergencies requiring a calculated risk of error in order to achieve a speedy decision. For such emergencies it is provided that the agency may omit the entire intermediate decision procedure in an application for an initial license[1] and may itself render a final decision on the record taken by the hearing examiner, if "the agency finds upon the record that due and timely execution of its functions *imperatively and unavoidably* so requires." (Emphasis supplied.)

In the instant case, the Commission made this finding in the very words of the statute. The finding, as has been noted, was explained in terms of the possible cancellation of gas purchase contracts upon which the project depended, "unless final action is taken by the Commission prior to December 31, 1956." The Commission recognized that its action might make it seem that it was permitting appli-

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[1] Cf. *Chotin Towing Corp. v. Federal Power Commission*, No. 14,031, decided November 1, 1957.

cants to control the procedure by fixing contract dates, but it asserted that it was really doing no such thing, rather "giving primary consideration to the public interest."

It is obvious, as the Commission recognized, that it is unjustifiable to forego the security of the intermediate decision procedure simply because applicants fix arbitrary contract dates, for that would presage an early end to the whole scheme of administrative procedure so painstakingly established by Congress. What the Commission found in this case, to justify omitting the initial decision procedure, over and above the applicants' shotgun contract dates, does not appear. And it is not for us, of course, to supply deficiencies in the Commission's findings.

If it were our function to examine the record for the purpose of determining what justification existed for omitting the intermediate decision procedure, my reading of the record would tend to undermine rather than support the Commission's findings that omission was "imperatively and unavoidably" required. The record shows that, though the gas supply contracts gave the suppliers an option to cancel if the project were not certificated by a certain date, the date in question had originally been July 1956 in some of the contracts and had been extended. There is nothing in the record to show that the option date would not have been extended again. Nor was any evidence presented that the options to cancel would have been exercised if there were not a certificate by December 31, 1956. The possibility of cancellation, so far as appears from the record, never became more than a mere possibility. The Commission, indeed, found only that the contracts would "be subject to cancellation," *not that they would be cancelled.*

The lack of basis for the Commission's action is shown by subsequent events. The Commission found that the contracts would be subject to cancellation "unless *final action* is taken by the Commission prior to December 31,

1956."[1a] But, despite precipitate procedure, there was in fact no final action by the Commission prior to December 31, 1956. The Commission's Opinion No. 301 of December 28, 1956, found the proposal in "substantial" respects not to meet the public convenience and necessity[2] and it offered a certificate only with conditions. It disclosed that "although the conditions . . . are substantial, the alternative is to deny the applications." The applicants found this conditional grant unacceptable. They applied, instead, on January 24, 1957, for elimination of some of the conditions. Not till February 21, 1957, did the Commission resolve the question of elimination of the controversial conditions. And not till March 22, 1957, did the applicants accept their certificates of public convenience and necessity. Not a single one of the gas suppliers, so far as the record shows, exercised its option to cancel its contract during this delay of almost three months beyond the shotgun date.

There was thus no justification for taking the calculated risk of error inherent in omission of the intermediate decision procedure. Moreover, by its subsequent actions, as I shall now show, the Commission so greatly enhanced the possibility of error as to invalidate the proceedings.

I

[1a] That the contracts were conditioned on "final action" by the Commission by December 31, 1956, rather than merely the issuance of a conditional certificate of public convenience and necessity was found by the Commission;—not, as footnote 17 of the majority opinion states, "suggested" by me. It may be possible to construe the contracts to mean that any certificate, even a conditional one, would terminate the options to cancel. But the Commission did not so construe them. I do suggest that the court is not warranted in substituting its construction of the contracts for the construction adopted and acted upon by the Commission.

[2] The dissenting Commissioners said: "The conditions found necessary in the opinion and order of the majority confirm the fact that the project as proposed is economically impossible of completion."

The Decision

The hearings closed on November 28, 1956. The record of some 20,000 pages presumably reached the Commission on or after December 6, 1956, when it ordered omission of intermediate decision procedure.[3] Twenty-two days later the Commission issued its thirty-one page majority opinion and the five page dissent of two of its members. In that twenty-two day period, without the benefit of an initial or recommended decision prepared by the examiner who heard the evidence, or exceptions thereto filed by the parties, the five members of the Commission would have had to study the entire record, consider and decide the case, and prepare their opinions. Assuming that the Commissioners had no other functions to perform; assuming further that they commenced reading the record on November 28, 1956, as soon as the hearings closed and even before they had decided to omit the intermediate decision procedure; assuming further that hearing oral argument, reading the briefs filed by the parties, conferring, and writing the opinions took no time at all; and assuming finally that they worked every day, including Sundays and Christmas day; merely to have read the record, each of the five Commissioners would have had to read between 600 and 700 pages each day.[4] We need not, and I do not, undertake to decide how fast an administrative agency

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[3] The record had been certified to the Commission on November 16, 1956, in connection with the motion for omission of the intermediate decision procedure. In certifying it, however, the hearing examiner pointed out that it was only partial, since a dozen witnesses remained to be cross-examined and one or more intervenors or groups of intervenors were still expected to present their affirmative cases.

[4] The respondent argues in its brief that most of the record deals with matters as "noncontroversial" that "there would be little practical need for their being read." If that fact is true, the use of the intermediate decision procedure would have disclosed it. But the Commission, confronted with a raw record of evidence received by a hearing examiner as relevant and material, must assume that all of it is significant enough to be read. How the Commission was supposed to know which parts of the record there was "little practical need" to read the respondent does not suggest.

may work. It is our concern, however, to decide whether there has been a fair and substantial hearing. "And to give the substance of a hearing, which is for the purpose of making determinations upon evidence, the officer who makes the determinations must consider and appraise the evidence which justifies them." *Morgan* v. *United States*, 298 U.S. 468, 481-82 (1936). Only by closing our eyes to reality can we hold that the Commission did "consider and appraise the evidence" here.

Respondent argues but feebly against the arithmetical impossibility of a fair and substantial hearing.[5] Its position seems to be, however, that lack of a fair and substantial hearing is not prejudicial so long as the decision happens to be supported by the evidence. We cannot assume that extremely complex issues are correctly resolved by mere accident. And we should not assume that the Commission allowed its staff, which was fully familiar with the record through participation in the hearings, to play an undisclosed role in the decisional process. What respondent's argument comes to is that the lack of a substantial hearing can be remedied *nunc pro tunc* by having the reviewing court "consider and appraise the evidence," and in effect, re-promulgate the determinations which were invalid when made. This is not our function.[6]

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[5] See note 4, *supra*.

[6] We need not delve deeply into the record to conclude that the determination that the public convenience and necessity requires the project is not as clearly supported by the evidence as respondent suggests. It is enough to refer to the opinion of the two dissenting Commissioners, which begins as follows:

> The evidence and testimony of record, all fully tested on cross-examination and rebuttal, all fully briefed and argued, discloses the inherent weaknesses in this application. The conditions found necessary in the opinion and order of the majority confirm the fact that the project as proposed is economically impossible of completion. Even in the form which it would take if the conditions were met it would contain so many compromises with principle and rest on so much speculation for its success that the Act does not permit a finding that the public convenience and necessity requires its construction and operation.
>
> Let one thing be clear at the outset. This statement is addressed to

Post-Decision Proceedings

In its Opinion No. 301, issued on December 28, 1956, the Commission found the applicants' proposals deficient in respects which made them inconsonant with public convenience and necessity. It held that the applications as they stood would have to be denied. Instead of denying them, however, it offered the applicants an opportunity to file new tariffs, new service agreements and a new financing plan along lines suggested in the opinion and it proceeded to issue certificates of public convenience and necessity conditioned upon the filing of such revised proposals. Thereafter, the applicants applied for rehearing seeking elimination of some of the Commission's conditions and undertaking to comply with others. Petitioner sought to oppose this application, but its opposition was rejected by the Commission's secretary. Petitioner then appealed to the Commission from this rejection. On February 21, 1957, the Commission issued an order modifying the conditions it had imposed in its Opinion No. 301 and denying petitioner's appeal from the Secretary's refusal to accept its opposition.

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these particular projects, the one proposed and the one which would be created if conditions were met, and to those projects only. By no means do I oppose bringing natural gas into peninsular Florida nor do I disagree that the economy of the State would benefit from its introduction—if it could be done on an economically sound basis. But the economy most emphatically would not benefit if the project to bring it there were not economically sound. And those in issue here are not Accordingly I am reluctantly, but inevitably forced to dissent.

The project as proposed is plainly impossible unless the Commission surrenders all significant control over matters of regulatory concern to contractual agreement between the applicant and the customer for 60% of its service. This, necessarily, the Commission has refused to do. I do not believe it should make the gesture offering the unacceptable alternative. I feel the certificate is unacceptable because under its terms the principal customers, the power companies, cannot be expected to go along unless the Commission makes concessions in rate making principles which I do not feel are justifie at this time on this record. And if they do not go along, the project is not feasible.

The Commission held that a party's right to a hearing expires with the Commission's order granting a certificate, even a conditional one, and that subsequent proceedings in connection with the propriety of or compliance with the conditions may be *ex parte*. It said in its order of February 21, 1957:

> No party can question the Commission's power under Section 7(e) to "attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require," as the Act in terms provides. Clearly, under the statute, the only hearing required to support the imposition of a condition which is reasonable and required by public convenience and necessity is the specific and only hearing for which the pertinent section makes provision—the hearing on the certificate application. That hearing was had, and was full and adequate. The record was extensive and on the basis of it the Commission could either accept the project as proposed or at its discretion impose the reasonable conditions the public convenience and necessity required to bring the tariff and financing proposals into conformity with the Act's standards. We chose the latter course.

I note, but pass over, the Commission's seeming failure to reckon with the provision of § 7(e) of the Natural Gas Act, 15 U.S.C. § 717f(e), that, if it does not find that the proposal is required by the public convenience and necessity, "such application *shall be denied*." Nor do I think we need decide whether the power given the Commission by that section "to attach to the issuance of the certificate . . . such reasonable terms and conditions as the public convenience and necessity requires," authorizes the Commission to convert an invalid proposal into a valid one. What concerns me is an apparent subversion of the legislative scheme that contested applications for certificates of

public convenience and necessity be examined under the flood-lights of an adversary hearing.

Congress intended, both by the Natural Gas Act and by the Administrative Procedure Act, that, when there are parties in interest asserting that the certificate applied for will not serve the public convenience and necessity, the parties should be given a fair and substantial hearing and the issues should be decided on the basis of evidence taken at such hearing. If that evidence supports a grant the certificate should be issued. If it does not, the certificate should be denied. To the extent that the Commission has power to grant a certificate on condition that the proposal be amended, the certificate may be granted only if the evidence in the record supports it. The Commission may not, after finding from the evidence that a proposed project will not serve the public convenience and necessity, approve, *ex parte* and without additional hearing, a new proposal not covered by the evidence taken at the hearing. The Commission argued, in rejecting petitioner's opposition to the revised project, (1) that the only hearing required by law is "the hearing on the certificate application"; and (2) that it has the power to grant a certificate upon any condition which is reasonable and required by public convenience and necessity. From this it reasoned that, when a proposal is found on the evidence not to serve public convenience and necessity, it need neither reject it nor hold further adversary proceedings to determine whether a revised proposal would serve public convenience and necessity; but that it may simply banish the opponents from the proceedings and thereafter negotiate *in camera* with the proponents for a desirable proposal. This is fallacious reasoning which makes a farce of administrative procedure.

Counsel for the Commission now defend the Commission's banishment of petitioner on a different ground. They argue that further proceedings were unnecessary, not on the technical ground that there had already been "the hear-

ing," but because the revisions of the project were covered in and are amply supported by the evidence. But we must judge the Commission's action in the light of the reason it gave in taking it, not that of its counsel in defending it. *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, 87 (1943). If the evidence is indeed sufficient to support the revised project, we are entitled to have the Commission so find. Should we, absent such a finding, undertake to determine the sufficiency of the evidence, we should soon find ourselves in deep water. For example, in its Opinion No. 301, the Commission found, with respect to rates proposed to be charged the power companies for transportation of gas, that, "although the evidence is not sufficient to enable a determination of precisely what the proper rate should be, it sufficiently supports the conclusion that Houston Gas' presently proposed rates are not designed to require each class of service to bear its proper share of costs." Thereafter, in compliance with conditions imposed by the Commission, Houston Gas proposed to increase the transportation rate by two cents per thousand cubic feet. If we are to read the Commission's findings to mean that the evidence does not permit *any* determination of what the proper rate should be, it follows that there is nothing to support the sufficiency of the increased rate. If the Commission meant only that the "precisely" proper rate could not be determined from the evidence, but that an approximately proper rate could be determined, perhaps the two cent increase brought the rate within the approximation. But, so to find, we should have to determine initially, from all the accounting exhibits and other evidence, what the approximately proper rate should be. That prospect does not persuade me to depart from the rule of the *Chenery* case.

APPENDIX B

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Opinion No. 301

Docket G-9262

In the Matters of

HOUSTON TEXAS GAS AND OIL CORPORATION

Docket G-9960

COASTAL TTANSMISSION CORPORATION

OPINION AND ORDER ISSUING CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY UNDER SECTION 7(e) OF THE NATURAL GAS ACT

(Issued December 28, 1956)

Opinion No. 301

Before Commissioners:

Jerome K. Kuykendall, Chairman; Seaborn L. Digby, Frederick Stueck, William R. Connole and Arthur Kline

Opinion and order issuing certificates of public convenience and necessity under Section 7(e) of the atural Gas Act

(Issued December 28, 1956)

These proceedings, which are before the Commission pursuant to its order issued December 6, 1956, omitting the intermediate decision procedure, present for decision the question whether under Section 7(e) of the Natural Gas Act (Act) certificates of public convenience and necessity should be issued authorizing the applicants herein, Coastal Transmission Corporation (Coastal) and Houston Texas Gas and Oil Corporation (Houston Gas), to construct and operate joint pipeline projects extending from Texas to Florida, for the transportation and sale by applicants of certain volumes of natural gas and the transpor-

tation alone of other volumes to Florida markets thereby making natural-gas service available to consumers throughout that state.

The procedural background to this case can be stated briefly. Houston Gas filed its application for a certificate on August 26, 1955. That of Coastal was filed on February 3, 1956. By order issued June 21, 1956, the applications were consolidated. Over 50 parties were permitted to intervene in the proceedings. Pursuant to the June 21 order, the hearing commenced on July 9, 1956, continuing intermittently until the conclusion thereof on November 28, 1956. During the course of the hearing, the parties moved to conform their applications, which were originally for facilities to transport an average of 350,000 Mcf of gas per day, to seek authority to transport 250,000 Mcf per day in conformity with the evidence adduced. After the hearing, on December 5, 1956, the Commission issued its order providing for the omission of the intermediate decision procedure and fixing time for filing briefs. Pursuant to Commission order issued December 14, 1956, oral argument was had on December 21, 1956, and the case is now before us for decision on the merits.

In support of their motions for the omission of the intermediate decision procedure, applicants set forth that all of Coastal's contracts for the purchase of gas for resale, covering some 824 billion cubic feet of gas reserves, are subject to cancellation by the producers if Coastal has not received a certificate of public convenience and necessity from the Commission by December 31, 1956. Of course, this fact is immaterial to determining the merits of this case. However, we consider that irrespective of the decision reached, we should decide the merits of applicants' proposals rather than permit any delay in doing so to result in the possible cancellation of these supply contracts and the possible failure of the project on that account. So although we do not approve and will not countenance at-

tempts by any party to hasten decision by fixing or asserting deadlines, in this case it is in the public interest that our decision be issued before the end of the year.

Applicants' Proposals

Notwithstanding the relatively close proximity of the gas fields and the demonstrated benefits to the public which flow from the introduction of natural gas into an area, natural gas has been slow in coming to peninsular Florida—although it has today reached every other state in the nation of comparable size and importance.[1] To supply this deficiency, applicants have mounted a joint pipeline project which, commencing in the southernmost tip of Texas, would traverse the gas-producing areas lying in the coastal regions of Texas and Louisiana and proceeding across intervening states and down the Florida peninsula to the City of Miami and vicinity, would serve markets in the State of Florida.

Applicants' join project falls into two parts—Coastal's westerly portion extending from sources of supply in Texas and Louisiana to a point in Louisiana on the east bank of the Mississippi River; and Houston Gas' easterly portion extending from a point of connection with Coastal's line to markets in Florida. We shall set forth here only the principal features of these parties' proposals, deferring a more detailed description of them to the statement of the determinations we hereinafter reach in this case.

Coastal proposes to construct and operate a natural-gas pipeline system with a main line approximately 574 miles in length, extending from a point in Hidalgo County, Texas, near McAllen, to a point just east of the Mississippi River in East Baton Rouge Parish, Louisiana, approximately six miles north of the City of Baton Rouge. Coastal

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[1] Small volumes of gas are presently being delivered to a few communities in northern and northwestern Florida from the facilities of two pipeline companies.

also proposes to construct and operate a number of supply lateral lines, with a total length of approximately 414 miles, more fully described hereinafter, extending off its main line in Texas and Louisiana to some 48 production fields in those states. In addition, Coastal proposes to construct and operate four main-line compressor stations with a total of 16,500 installed horsepower. The total required capitalization for Coastal's project is estimated at $54,589,000.

Houston Gas proposes to construct and operate a natural-gas pipeline system approximately 942.6 miles long in its furthest reach. The company's system would begin at the point on the east bank of the Mississippi River where Coastal proposes to make deliveries to it, and proceeding across the coastal regions of Louisiana, Mississippi and Alabama, and thence eastwardly across the Florida panhandle its facilities would proceed southwardly to a terminus at Cutler, south of Miami, in Dade County, Florida. The western portion of this line would follow a route accessible to some of the gas-producing areas of Louisiana and Mississippi. Houston Gas also proposes to construct and operate approximately 662 miles of lateral lines within the State of Florida, as more fully described hereinafter, to serve 34 distributors and 17 industrial users in the state. In addition, Houston Gas proposes to construct and operate four main-line compressor stations, each having 6,000 installed horsepower. The total cost of facilities for this project is estimated at $94,285,000.

Under the parties' present proposals, Coastal would initially constitute Houston Gas' sole source of supply and the latter in turn would constitute Coastal's sole market. By means of its above-described facilities, Coastal proposes to transport and deliver to Houston Gas on a cost-of-service basis an initial average volume of 248,642 Mcf of gas per day with an initial daily maximum of 273,506 Mcf. Third

year average and peak day volumes would be the same.[3] A large part of these volumes—some 100,000 Mcf per day average—would be purchased by Coastal in the gas fields under contracts with producers, and would be transported and delivered to Houston Gas for transportation and resale by the latter to Florida markets.

However, a substantial part of the foregoing volumes—some 150,000 Mcf per day average—would consist of "transportation" gas, that is gas delivered to two large Florida power companies for use as boiler fuel in generating electricity. This gas transportation arrangement is a distinguishing feature of applicants' proposals. Under it, gas is purchased by the power companies, Florida Power & Light Company (Florida Power & Light) and Florida Power Corporation (Florida Power) in producing fields in Texas and Louisiana. Received initially by Coastal, it is transported by Coastal and Houston Gas successively for a charge to its delivery point to the power companies in Florida. Houston Gas is, under contracts with the power companies, responsible for the deliveries of this transportation gas and receives payment from the power companies for this service, in turn compensating Coastal under the cost-of-service agreement between Coastal and Houston Gas, for Coastal's part in rendering this service.

As mentioned, under the parties' present proposals, Houston Gas would constitute Coastal's sole market, purchasing and receiving for transportation respectively, the foregoing respective volumes. Houston Gas would transport this gas to Florida for delivery to its three categories of customers: resale customers, direct industrial customers, and the two power companies which would receive the transportation service referred to above. Houston Gas

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[3] On the 14.73 psia basis customarily used by the Commission. These volumes are 259,000 Mcf and 370,000 Mcf per day respectively on a 14.65 psia basis. However, applicants propose to transport 373,000 Mcf per day if required, under certain peak load conditions.

proposes five classes of service for these three categories of customers. As more fully described hereinafter, both firm and preferred interruptible service is proposed for resale customers. Preferred interruptible and primary interruptible service is proposed for direct industrial customers. The transportation service would be on a firm basis.

The Commission's Determinations

We are here called upon to determine whether or not Coastal and Houston Gas have shown that the authorizations they seek satisfy the requirements of public convenience and necessity embodied in Section 7(e) of the Act including such elements as an adequate gas supply, adequate markets, facilities which are reasonable and feasible from the standpoint of cost and design, reasonable and feasible financing, and the economic feasibility of the projects. On consideration of these various elements and from an evaluation of them in combination, giving to each its appropriate weight, we must determine whether in regard to the foregoing and other material particulars, applicants' proposals and the various aspects thereof are required by the public convenience and necessity.

This is a case of contrasts. On the one hand there is unmistakably a real desire and need for natural gas on the part of Florida markets. Florida is a fuel have-not area of the nation, possessing practically no native usable energy supplies. Although it has a growing population and a considerable industrial potential, it is almost entirely dependent on imported energy to meet its domestic, industrial and power generating requirements. Florida's dependency on imports consisting chiefly of petroleum products brought in by tanker and barge makes its economy vulnerable to interruptions of this single source of supply and is moreover undesirable from the competitive standpoint. Supplies of gas are available however, in reasonably accessible gas fields and terrain features are favorable to the con-

struction and operation of natural gas pipeline facilities for carrying gas to Florida. These are some of the factors which favor making natural gas available to markets in this state.

On the other hand, the unique conditions which prevail in Florida and the very nature of the need for natural gas in that state, substantially increase the difficulties which attend planning a pipeline to meet that need. Florida's climate is mild, and the degree day deficiency and correspondingly the load factor of any pipeline supplying gas to Florida markets would necessarily be relatively low. Likewise, the percentage requirement for natural gas for firm domestic and general service purposes would be low. And although Florida's industrial market is growing, it too is relatively small. Thus a large part of the Florida market would appear to consist of sales in direct competition with other fuels to power companies and others for use in generating electricity. These are among the somewhat exceptional circumstances which impose substantial obstacles to planning and operating a pipeline project to meet the needs of Florida markets.

Applicants' proposals reflect the foregoing contrasts and in addition comprehend certain others. Thus on the one hand, applicants can point to willing purchasers of the volumes of gas they propose to deliver to Florida markets on the conditions applicants set forth and to the reasonable prospect of substantial future markets. Likewise, applicants have assembled an adequate gas supply, one which suffices to meet the deliveries proposed and offering moreover the assurance of additional future supplies. Also, the facilities proposed by applicants can be found adequate. In contrast, applicants' proposals embody certain unfavorable features which have been pointed out by the staff and various intervenors. Some of those features, such as the large proportion of gas to be used for boiler fuel in generating electricity, are perhaps inherent in the initial stages of any

proposals to supply natural gas to Florida. As to them, it appears that their undesirable aspects are outweighed by the benefits which would flow from applicants' projects and they can be found supportable under the Act. Others, however, relating to applicants' rate proposals and contracts, and particularly to the gas transportation arrangement, have not been shown to be required by the public convenience and necessity and cannot be accepted on their present terms.

On balance, however, on the record in this case and upon consideration of the competing factors it presents, we are able to conclude that the basic authorizations applicants seek, as hereinafter more fully set forth, are required by the public convenience and necessity, subject however to various conditions hreinafter described making provision for the aspects of applicants' proposals which we cannot find are supportable. We shall set forth our determinations with respect to each of the elements of public convenience and necessity and deal concurrently with such objections to applicant's proposals as may exist in connection with each.

Gas Supply—An important feature of applicants' proposed projects is the volumes of gas which have been assembled to meet their gas supply needs. This is a matter concerning Coastal primarily, since Houston Gas would initially receive all the gas transported over its facilities from Coastal. From the standpoint of both gas reserves and availability, the parties have established a supply of gas fully adequate to support their projects as proposed. As previously indicated, the parties' operations have two principal aspects—the purchase of gas directly for resale, and the transportation of gas for Florida Power & Light and Florida Power.

To meet the direct purchase requirements, Coastal has entered into some 47 20-year gas purchase contracts with 33 different producers in 37 different fields. The total re-

coverable gas reserves committed to Coastal (of which 29,503,000 Mcf in the South Alvin Field are untested) are estimated at 824,275,000 Mcf, with a life index on a full delivery basis of 20.6 years. From the standpoint of availability, these reserves are sufficient to meet the present resale requirements of 109,464 Mcf pr day, or 39,954,000 Mcf annually for 17 years.

Further, Coastal's line traverses an area containing the major portion of the proved natural-gas reserves in the nation. The record establishes the existence in this area of substantial uncommitted reserves which Coastal is in a position to acquire. Also the likelihood exists of additional discoveries of which Coastal may be expected to secure its share. These factors even further strengthen applicants' gas supply situation.

As to the reserves for transportation gas to Florida Power and Florida Power & Light, these two parties have entered into 20-year contracts for gas to meet their requirements. Florida Power has contracted with Sun Oil Company and Pure Oil Company for gas from the latters' reserves in two fields in southern Louisiana. Florida Power & Light has contracted with Sun for gas from Sun's reserves in fourteen fields in south Texas, which reserves include those of two other companies in one of those fields. The gas would be delivered to Coastal at central points in the fields. The total of these transportation gas reserves under contract is estimated at 1,046,747,000 Mcf, of which approximately 16,000,000 Mcf in the Chacahoula field are untested.[1] These reserves have a life index on a full delivery basis of 20.2 years. From the standpoint of availability, they are sufficient to meet full requirements for transportation gas of 142,083 Mcf per day, or 51,858,000 Mcf annually for 16 years. In addition, under the contracts, Sun and the other sellers are required to furnish the full

[1] Eliminating the untested reserves of both Coastal and Houston Gas the supply is still adequate.

contract demand for the entire 20-year period, which furnishes additional assurance of the adequacy of the transportation reserves.

Thus the record establishes and we find that there is available a supply of gas sufficient to support applicants' projects and to meet the demands of the markets they propose to serve. However, the direct purchase contracts and the transportation gas arrangement, as well as the service agreement between Coastal and Houston Gas, involve features which are objectionable and which call for the imposition of corrective conditions. These matters will be hereinafter considered in separate parts of this opinion dealing with the transportation arrangement and the rate aspects of the parties' proposals, at which time a fuller description of the particular agreements will be necessary.

It may be noted at this point, however, that the cost of gas for resale under Coastal's contracts range from 16.0 cents per Mcf in southwest Texas to 17.55 cents per Mcf in Louisiana, with a weighted average of 16.8 cents per Mcf (all on a 14.65 psia base). For the transportation gas, Florida Power & Light and Florida Power will pay the producers 18.5 cents per Mcf for gas delivered in Texas. The price for gas delivered in Louisiana will be 21.0 cents per Mcf for the first two years after the date of initial delivery and 22.5 cents per Mcf after the first two years. The foregoing prices are subject to escalation up or down by one cent per Mcf for each change of 6.6 cents in price of Bunker "C" fuel oil per barrel from $2.10 to Florida Power & Light and $2.45 to Florida Power.

Markets.—The record establishes the existence in Florida both of a desire and need for natural gas, and of the existence of markets ready and waiting for all the volumes of gas applicants propose to transport and to sell under their plan of operation. The public demand and need for gas were attested to by numerous state and city officials as

well as representatives of consumer interests and others. The existence of particular markets is demonstrated by the numerous service agreements and contracts entered into and by letters of intent to enter into such agreements. Clearly, there exists in the territory proposed to be served, customers who can reasonably be expected to take on the proposed service.

The public need for gas in Florida and the corresponding benefits of gas service to consumers in that state derive from a number of circumstances. We have already mentioned some of the market factors which favor the introduction of natural gas to Florida. It is obviously at a disadvantage, both competitively and otherwise, by its dependence upon petroleum products, a single source of fuel.[1] The introduction of natural gas, in addition to making available to consumers in Florida the usual benefits of natural gas of cleanliness, convenience and economy, would provide a second source of fuel to help forestall any possible emergency shortage, would give rise to greater fuel competition in the state with its attendant public advantages, would aid in the economic development of the state by stimulating industry and otherwise, and would help meet the growing fuel demands of the burgeoning Florida population.

As indicated previously, Coastal's proposed project contemplates Houston Gas as the sole market for the gas which Coastal transports through its system, including the transportation gas destined for Florida Power & Light and Florida Power, and resale gas purchased by Coastal under the direct purchase agreements with producers. The direct purchase gas for certain, would be transported by Houston Gas for sale in Florida markets.

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[1] For example, during World War II, the heating and industrial fuel supply, as well as the electrical and petroleum gas supply of the state, were critically threatened by the tanker sinkings and the enlarged military oil needs of that time.

Coastal would be reimbursed by Houston Gas for all of the foregoing on a cost-of-service basis. Coastal's Gas Service Agreement with Houston Gas constitutes Coastal's entire market showing as well as its sole tariff exhibit. Although the foregoing facts, as more fully set forth in the record, establish the existence of a market for the gas Coastal proposes to transport and to sell, both the transportation agreement and the Coastal-Houston Gas Service Agreement contain features which have not been shown to be required by the public convenience and necessity. These matters will be pointed out below wherein we deal with rates, where we shall also fully detail the terms of these agreements.

Turning to the markets of Houston Gas, this applicant proposes to render three categories of service to consumers within the State of Florida: (1) the sale of natural gas for resale to resale gas distributors, both privately and municipally owned; (2) the direct sale of natural gas to industrial customers; and (3) the transportation service to Florida Power and Florida Power & Light referred to above. As mentioned, Houston Gas proposes five classes of service for these three categories of customers. Both firm and preferred interruptible service is proposed for resale customers. Preferred interruptible and primary interruptible service is proposed for direct industrial customers. The transportation service would be on a firm basis.[4]

Houston Gas proposes to serve 34 resale customers, which with the volumes of gas they propose to purchase, are listed in Appendix A hereto. Evidence has been adduced with respect to this applicant's proposed resale customers show-

[4] Preferred interruptible service may be interrupted when firm resale and transportation service require the pipeline capacity. Primary interruptible service may be interrupted on short notice at the option of Houston Gas and carries the lowest rates. Firm transportation service may not be interrupted, except that one of the two power company customers, Florida Power, has agreed to surrender a portion of the peak-day pipeline capacity assigned to it, if such capacity is required for firm resale service.

ing the population to be served, the form of commitment for the purchase of gas, the investment required, plans for financing and related engineer and economic data. This and other evidence of record establishes that these customers will take and utilize the volumes of gas applicant proposes to sell to them. Houston Gas will sell to its resale customers in the first three years of operation approximately 18,895,776 Mcf, 24,173,113 Mcf, and 29,185,913 Mcf, respectively. Of these total volumes, 12,164,913 Mcf will be sold for firm service in the first year, 15,875,969 Mcf in the second year, and 19,395,669 Mcf in the third year of operations. The estimated peak-day requirements of applicant's resale customers in the first three years of operations are 107,812 Mcf,[4a] 141,740 Mcf, and 174,953 Mcf, respectively.

Applicant proposes to serve 17 customers on a direct sale basis and has signed contracts with them for the service proposed. These customers' names and the volumes proposed to be purchased are set forth in Appendix A hereto. Two types of service are proposed to be rendered direct sale customers—preferred interruptible and primary interruptible. Direct sales for industrial use of 19,385,482 Mcf will be made in the first year of service, 14,108,045 Mcf in the second year and 9,095,345 Mcf in the third year of service. Of this volume, 5,909,114 Mcf annually will be sold and delivered to various phosphate, citrus processing, and other plants on a preferred interruptible basis. The remaining 13,476,368 Mcf will be sold to eight of the customers on a primary interruptible basis for use in power plants, both municipally and privately owned. None of the interruptible direct sales customers would be served on a peak day in any of the first three years of operation. Here also, the evidence establishes the existence of markets for the volumes proposed to be served to this class of customer.

[4a] For the first year an additional 11,344 Mcf will be sold as preferred interruptible gas to the resale customer companies.

Likewise, the record leaves no doubt of the existence of purchasers for the volumes of gas involved in the transportation arrangement referred to previously. As mentioned, Houston Gas will transport and deliver, under 20-year contracts, on a firm basis, a daily average of 100,000 Mcf to Florida Power & Light and 50,000 Mcf to Florida Power, or annual volumes of 36,500,000 Mcf and 18,250,000 Mcf to each respectively in each year of operations. Daily minimum quantities of 90,000 Mcf and 45,000 Mcf will be delivered to Florida Power & Light and Florida Power respectively, subject, however, to curtailment by applicant of deliveries to Florida Power.

As to the composition of applicants' markets, on an annual basis the third operating year sales can be classified as 20.8% firm resale; 10.5% resale preferred interruptible; 6.4% direct preferred interruptible; 3.4% direct primary interruptible and 58.9% transportation service.

Facilities—We conclude also that applicants' facilities as set forth in their respective applications are adequate to render the service proposed and meet the demands that may be placed on them, and that they are reasonable from the standpoint of cost. The main features of each applicant's project are described above, and are more fully set forth in their applications as amended.

Summarizing, Coastal will receive its supplies of gas both for resale and for transportation from central points in the gas fields and will transport the gas to its main transmission line by means of supply laterals totaling approximately 414 miles in length, the cost of which is estimated at $7,299,500. Coastal's main-line facilities, some 574 miles in length, include portions of line 12, 20, 22 and 24 inches in diameter and involve 25 river crossings and one ship channel crossing. The total estimated cost thereof is $34,080,000. Four compressor stations supplying 2,500, 4,000, 4,000 and 6,000 horsepower, located respectively in Nueces, Matagorda and Jefferson Counties,

Texas, and East Baton Rouge Parish, Louisiana, will cost a total estimated $4,290,000. Taking into account the cost of certain supply laterals which Coastal will purchase from Sun Oil Company and a small return from the salvage of a part thereof, the addition of other capital costs of $7,279,000 to the foregoing sums, bring the total estimated cost of the project to $54,279,000.

Houston Gas, as indicated above, will transport gas received from Coastal over its facilities to Florida markets. Extending from a point of connection with Coastal's facilities, Houston Gas' 24-inch line branches at Kissimmee, in Osceola County, Florida, into two 18-inch lines, the eastern branch extending to Ft. Pierce and thence south to Miami and the western branch to Tampa and St. Petersburg. Regarding the eastern branch as part of Houston Gas' main line, the total cost thereof is estimated at $61,188,200. Four compressor stations supplying 6,000 horsepower each, costing a total estimated $6,240,000, will be constructed at appropriate points on the company's system. Houston Gas also proposes to construct a total of 682.5 miles of lateral lines ranging from 18 inches to about 3 inches in diameter, extending from its main line to 84 communities and industrial customers. The total estimated cost of the lateral systems is $13,874,800. With the addition of further capital and organizational costs of $12,982,000, the total estimated cost of the project comes to $94,285,000.

Coastal presented evidence showing both the general and detailed facts of its proposed pipeline system, including the location, design, capacity and mode of operation thereof. This and other evidence of record justifies the conclusion that Coastal's facilities can transport the 278,000 Mcf of natural gas for delivery to Houston Gas on the third-year peak day as proposed and is otherwise capable of meeting the requirements proposed to be placed on it. In addition, applicants put in evidence of estimated

costs of materials and construction, and of plans for securing needed materials, including contingent contracts for compressors, engines and all pipe required for both projects. This evidence establishes that Coastal's proposed project is feasible and reasonable from an engineering standpoint and that it can perform the service proposed. Likewise, we find that the estimates of material and construction costs for its project are reasonable.

Houston Gas has likewise presented evidence pertaining to the engineering feasibility and cost estimates of its project. As to the latter, the evidence supports a finding that its cost estimates for materials and construction compare favorably with present-day costs experienced by other pipeline companies and are reasonable. As to the former, it appears that Houston Gas' project may be capable of delivering peak-day volumes of gas to the various sales points only assuming an overload of 10% or in that vicinity. It is generally undesirable to operate compressors at an overload, and we have been unwilling to require the practice over a company's objection. However, in this case applicant has not expressed opposition to so doing nor does it appear that the use of overload for the delivery of peak-day volumes to the extent necessary in connection with applicant's proposals is infeasible or would be attended by deleterious effects, particularly in view of the short time the practice, if necessary at all, may be expected to continue.

Economic Feasibility.—It is true that the record indicates that when the expected revenues of Coastal and Houston Gas are applied to their rate bases, after deducting operating expenses and debt expenses, the return in each case for the first three years appears to be less than fair, but as the return appears to increase each year and as the demands of the markets may reasonably be expected to grow, the load factor and the return should continue to increase. We do not think that the conditions

relating to the tariffs and financing plans which we shall hereafter attach to the issuance of these certificates will render applicant's projects less feasible economically—in fact, they may be expected to increase their revenues and hence the economic feasibility.[5]

Taking the case of Coastal first the annual revenues for its third year of operations are expected to be $13,329,072. Its annual operation and maintenance expenses are estimated to be $1,311,800 for each of the first three years of operation including items relating to pipeline, compressor station, communications, dispatching, district offices and administrative and general expenses. Based on the data appearing in the record, these costs appear to be reasonable. Coastal's total operation expenses, depreciation and taxes for its third year are estimated to be $10,657,346. When the latter amount is deducted from revenues and the resulting net operating revenues of $2,671,726 are applied to the rate base of $49,590,925, a rate of return for the third year of 5.39% is obtained. Likewise, Coastal's rates of return for the first and second years would be 4.48 and 5.34%.

Similarly, Houston Gas' estimated annual revenues for its third year amount to $24,563,716, and its operation and maintenance expenses and administrative expenses, including salaries and those relating to compressor stations, lines, meters and regulator stations for the first three years of operation are estimated to be $2,022,845. These items compare favorably with the costs association with other pipeline companies that have recently had proceedings before the Commission, and like the similar costs of Coastal ap-

[5] We have in mind particularly the elimination of the cancellation and curtailment clauses in the transportation agreements between Houston Gas and Florida Power and Florida Power & Light, the requirement that the transportation service be rendered by both applicants on the basis of cost, and the provision in Coastal's tariff by which Coastal's service to Houston Gas will continue on a basis that will render the rate of return of both companies equal.

pear to be reasonable. Houston Gas' total operating expenses, depreciation and taxes for its third year amount to $19,440,840. Making the same computation as for Coastal, deducting operating expenses, depreciation and taxes of $19,440,840 from revenues leaves a net income of $5,122,876 which when applied to the net rate base of $86,135,512, yields a return of 5.95%. The corresponding rates of return for the first and second years are 4.48% and 5.34% respectively.

These rates of return appearing in the record for Houston Gas have been raised appreciably through the effect of an agreement in Coastal's proposed cost-of-service rate for its sales to Houston Gas by which the rates of return of both companies would be equalized. This agreement provides that if during the first three years of operation, Houston Gas' net annual rate of return on its net investment rate base is less than 6%, Coastal will reduce the return item of its cost of service in billing Houston Gas so as to equalize the rate of return before federal income taxes to Coastal and Houston Gas. If it were not for this agreement, Houston Gas' return for the first three years of operation would be reduced to 3.5%, 3.6% and 4.5% respectively. As we are requiring the substitution of an arrangement, similar in effect, without the three-year limitation, Houston Gas should continue to get the advantages of the higher rates of return.

Thus as set forth above, applicants have in the foregoing respects satisfied the elemental requirements of gas supply, markets—assuming that loads will be attached under the conditions we impose—and facilities. Also, the requirement of economic feasibility has been met under applicants' proposals and we consider can be met under the conditions we shall hereinafter impose assuming that the certificates are accepted subject to those conditions. However, certain features of applicants' proposals are more controversial and concerning some, serious objection exists. In consid-

ering these controversial aspects, we are mindful of the atypical character of the Florida natural-gas market. Further, we are aware that prevailing conditions are somewhat adverse to borrowing the large sums of money and securing the large gas purchase contracts with producers which are necessary to inaugurating a pipeline project of the magnitude of applicants'. In view of these facts, we conclude that it is in the public interest to conserve and utilize those features of applicants' projects which have been shown to meet the Act's requirements, imposing the conditions which the public convenience and necessity require to bring the projects into conformity with the Act's standards. Thus, although the conditions which we shall impose are substantial, the only alternative is to deny the applications. The course we shall pursue leaves open the possibility that applicants can overcome the deficiencies which we shall point out and thereby attain the objective of paramount concern to all in this case—natural-gas service at reasonable rates to Florida consumers, under circumstances which protect all substantial interests relating thereto.

Rates and Related Matters.—Turning now to the controversial aspects of applicants' proposals, we consider first rates and related matters, of which the most important is the gas transportation arrangement. This is the key to applicants' proposals in this case, applicants themselves characterizing it as the backbone of their proposed projects. As indicated previously, it involves the transportation by Coastal and Houston Gas successively of a total average daily volume of 150,000 Mcf of gas, constituting some 60% of applicants' initial average daily volume of 250,000 Mcf, for delivery to Florida Power & Light and Florida Power in Florida. These volumes—100,000 Mcf and 50,000 Mcf for Florida Power & Light and Florida Power respectively—would be purchased by the power companies under their contracts with producers, being delivered by the producers to Coastal at central points in

the fields. Coastal would transport and deliver the gas to Houston Gas, charging the latter under its cost-of-service agreement, there being no specific rate applicable to the transportation service alone in the cost-of-service, however. Houston Gas would in turn transport and deliver the gas to the power companies' plants in various points in Florida, receiving payment for the transportation thereof under its Rate Schedules T-1 and T-2.

At the outset, we may observe that the fact that this arrangement involves the transportation of very substantial volumes of gas for use as boiler fuel does not require its rejection. In this regard, this case is *sui generis*. We have already detailed the characteristics of the Florida market which require us, in the public interest and within the limitations of our permissible discretion, to admit of a departure in this case from the standards we have heretofore applied in determining whether to approve of boiler fuel sales. Moreover, the record supports the conclusion that as applicants' service develops,[6] the proportionate part of its sales devoted to uses which more fully employ the distinctive potentials of natural gas will increase.

However, the gas transportation arrangement is subject to such basic defects and would be of such uncertain and contingent effect upon applicants' operations that it cannot be approved as it stands. Accordingly, conditions must be attached to the issuance of certificates in this case requiring applicants to correct those defects and infirmities.

As to those defects, in the first place, the gas transportation arrangement calls for a transportation rate which, determined basically on a comparison with a competitive fuel, namely oil, would initially be substantially below the

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[6] The facilities of Houston Gas were designed to transport a daily volume of 400,000 Mcf of gas by the addition of more compressor facilities. The market and gas supply situation offers the reasonable prospect of substantially increased future deliveries with a corresponding improvement in load and lowering of unit costs.

cost of rendering the transportation service and is designed moreover to insure that the charges to the power companies for natural-gas service will remain competitive with those for oil, without giving due or appropriate regard to the various factors which are material and should be considered in fixing proper rates for such service, or to the fact that other classes of service would be required by reason of this arrangement to assume a proportion of the costs of operations in excess of their fair share.

In addition, the transportation arrangement contains provisions which permit the power companies to cancel or reduce their obligation on a number of different contingencies most of which look to relieving the power companies of their obligations to buy gas if the price of gas becomes non-competitive with that of oil. The invocation of these provisions could leave both applicants with large amounts of unused capacity which to avoid possible economic disaster, would necessitate their finding comparable markets and gas supply, or shifting to present markets a cost load which they cannot reasonably be expected to support.

Furthermore, in less important respects relating to matters both of form and substance, the gas transportation arrangement is violative of the Commission's rules and regulations.

Turning to a consideration of the foregoing objections *seriatim*, it clearly appears that basically, Houston Gas' rates applicable to the transportation service for the power companies were determined on a comparison with the value of a competing fuel, oil. This appears more particularly from examination of the pertinent rates. Thus Florida Power will purchase its gas supplies from Sun Oil and Pure Oil in Louisiana at a price of 21 cents per Mcf for the first two years and 22½ cents per Mcf thereafter. Florida Power will pay a transportation rate to

Houston Gas of 13 cents per Mcf for the first two years, making a total of 34 cents; and 11.5 cents thereafter, again making a total of 34 cents. Florida Power & Light will purchase from Sun Oil in south Texas for 18½ cents per Mcf and will pay a transportation rate of 15½ cents per Mcf, again making a total of 34 cents per Mcf. As stated above, the producer prices are subject to escalation up or down by one cent per Mcf for each change of 6.6 cents in the price of Bunker "C" fuel oil per barrel from $2.10 to Florida Power & Light and $2.45 to Florida Power. Thus the price of oil would be the determining factor[*] in fixing the transportation rate to the power companies. But we have in the past utilized cost as a basis in determining pipeline rates and have permitted a departure therefrom only under extenuating circumstances; and such is not the case here, as more fully appears below.

Furthermore, the record indicates that these transportation rates fall far short of being commensurate with the cost of firm service, and in fact bear much less of the transportation cost burden than Houston Gas' rates to its other customers. Houston Gas under its FPC Gas Tariff, volume No. 1, proposes to render jurisdictional service to firm customers at 55¢ per Mcf (Rate Schedule G) and to preferred interruptible customers at 33¢ (Rate Schedule I); under Volume No. 2 of its tariff will render the transportation service to Florida Power and Florida Power & Light at the rates detailed above. It also will render non-jurisdictional service to preferred interruptible customers at 33¢ and to primary interruptible customers at 30.1¢. The sales rates of course include purchase gas costs which are not applicable to the transportation costs.

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[*] It is also fully evident from the reply brief of Florida Power & Light, where this party candidly acknowledges that the arrangement was designed to insure that the price of gas delivered to it would continue to be competitive with that of oil.

Testing on the basis of data contained in an exhibit submitted by a witness for Houston Gas,[1] it is shown using the "Test Method" for the third year of operation that the cost per million B. t. u. for the firm transportation service is 16.1¢ compared to revenues of 14.2¢, while both cost and revenues for firm sales for resale are 55¢, and the cost for preferred interruptible sales is 26.3¢ compared with the revenues of 33¢. The result is that the deficiency in revenues during the third year of operation for the transportation rates is approximately 1,100,000 while the deficiency for the first and second years of operation is even greater. Testing in a different way, if we subtract from Houston Gas' preferred interruptible service rate purchased gas costs of 16.53¢, there is left a balance applicable to interruptible transportation of 16.47¢ which is in excess of the highest firm transportation rate of 15.5¢ per Mcf.

Thus, although the evidence is not sufficient to enable a determination of precisely what the proper rate should be, it sufficiently supports the conclusion that Houston Gas' presently proposed rates are not designed to require each class of service to bear its proper share of costs. In addition, since the price of gas in the field would escalate with changes in the price of oil, and since the transportation rate is designed to enable the sale of gas at competitive prices, changes in cost which could not be absorbed in the transportation rate would have to be taken up in rates for other classes of service.

Turning to the cancellation provisions relating to the gas transportation agreement, their pervasive effect can be seen from an examination of the contracts. In the first place both the contract with Florida Power (T-1) and the contract with Florida Power & Light (T-2) are automatic-

[1] Although Houston Gas does not rely on any cost allocation in support of its rates, a cost of service for the first three years as well as the allocation thereof on two different bases, the "Test Method" and the "Houston Method," were presented in evidence.

ally cancelled if the gas purchase contracts conveying the gas to be transported are cancelled (Article IV in each agreement). The gas purchase contracts may be cancelled if this Commission asserts any jurisdiction over the seller by reason of the transaction. Further, both contracts, in effect, give the buyer the option to cancel if the initial contract rates are not approved by the Commission[8] and also in the event of future rate increases. Under the terms of the contract with Florida Power, a rate increase even when permitted by the Commission may justify cancellation unless "directly and reasonably related to the furnishing of the transportation service being rendered by Houston" Gas (paragraph 22). The language of the contract with Florida Power & Light is similar (paragraph 22). In its contract Florida Power & Light may cancel if a more favorable rate schedule made available to a third party is not made available to it (paragraphs 39, 45).

Houston Gas and Coastal argue in their joint reply brief that the quoted language does not give rise to a right of cancellation because "it is proper to assume that any increase in the rate will be reasonably attributable to the performance of the transportation service." This is not a sufficient answer. What applicants appear to be doing is adding a standard for rate regulation additional to those provided in the National Gas Act and they, it would appear, will be the judges of whether action on the part of the Commission conforms to that standard. These paragraphs still result in a right of cancellation, therefore.

In addition to the outright cancellation provisions, the quantity of gas taken under each contract may be reduced in accordance with the terms of the gas purchase contracts which provide for such reduction where the purchase price

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[8] In Section 22 of Rate Schedule T-1; the same result seems implicit in Section 22 of Rate Schedule T-2, where reference is made to "the initial rate permitted by the Federal Power Commission in Houston's original rate schedule."

plus the transportation rate, with various adjustments, becomes greater than the cost of equivalent fuel oil. Under the Florida Power contract the reduction is not to be more than one-third in the first fifteen years (Article 38), and in the Florida Power & Light contract not more than one third in the first 11½ years (Article 37).

The parties themselves argue variously as to the effect and purpose of this and the foregoing provisions. Applicants seek to minimize their impact and the likelihood of their being invoked. The power companies insist however, that they are essential features of the contracts and would be given effect if the circumstances warrant. This, we believe, forcibly emphasizes that apart from their possible effects, the very fact of their inclusion in the parties' contracts is seriously objectionable. For they would create basic uncertainty as to essentials which must be reasonably ascertainable in order for it to be found that a project is feasible, and their allowance would thus be fundamentally at odds with proper regulatory processes.

The foregoing objections to the gas transporation arrangement relate principally to Houston Gas, since it, not Coastal, is party to the contracts with the power companies. However, Coastal is also rendering a transportation service for the power companies. Notwithstanding, no agreement covering this service was executed between Coastal and the power companies. Instead, the cost-of-service agreement between Coastal and Houston Gas incorporates this service as part of the service being rendered by Coastal to Houston Gas.

This is objectionable on a number of counts respecting both substance and form. Those of form are mentioned subsequently. The most important of substance is the fact that the costs associated with the transportation service are not set forth separately from the costs for the other classes of service, nor is there a particular rate for the transportation service designed and set forth on the basis of such costs.

Wherefore, in respect of the gas transportation arrangement, we find that the public convenience and necessity requires that the certificates issued to Houston Gas and to Coastal be subject to conditions requiring these parties to remedy the above-described defects. Houston Gas should be required to file new transportation rate schedules (T-1 and T-2) from which the cancellation provisions and reduction of take provision referred to have been eliminated. The rates contained in such rate schedules should be commensurate with the costs related to the service to be rendered and based upon the usual Commission cost-of-service allocation practices. Likewise, Coastal should be required to file a new cost-of-service formula in tariff form, which will provide separate charges applicable to the transportation service and to the gas sold to Houston Gas commensurate with the costs related to such services and based upon the usual Commission cost-of-service allocation practices.

We are aware of the suggestion which has been made that any material alteration in the gas transportation agreements could result in the power companies' exercising their right to terminate their contracts with Houston Gas. For as we have seen, the matter of primary concern to them is that the transportation charge remains sufficiently low to enable them to utilize natural-gas service at a cost lower than that for oil service. This is understandable from their point of view, since they are themselves regulated utilities and have an obligation to limit their costs as rigorously as possible.

However, this fact does not justify our certificating a proposal carrying with it rate and contract provisions which attach such paramount and overriding importance to maintaining the price for gas service at levels competitive with another fuel. So to do would subordinate numerous matters of substantial concern—the sufficiency of revenues to meet costs and pay the investor his return, the fair and

proper allocation of costs, the existence of possibly discriminatory rates, the very existence of not only the chief market for gas but the principal source of supply—to this sole consideration and in consequence throw the burden of transportation costs on customers who may not fairly be called on to bear them, under conditions which could moreover endanger the economic feasibility of the project by permitting all or a substantial part of the market to be curtailed or suddenly cut off.

Sympathetic though we are to the need and desires to many interests in Florida seeking the introduction of natural gas there and mindful though we are of the rather atypical conditions which perhaps justify some relaxing of the standards ordinarily applied, we cannot approve a project of such a character and possessing the potentiality of such an adverse effect on all those interests we are charged to protect.

The public convenience and necessity requires also the imposition of conditions respecting other aspects of the rate proposals of Coastal and Houston Gas, including rate of return. As stated above, in its proposed agreement with Houston Gas, Coastal for the first three years will reduce its bill, rendered on the basis of cost-of-service, with a 6¼% rate of return, by an amount sufficient to equalize the rate of return of the two companies. This agreement, as it stands, fails to meet the requirements of a rate that it be definite and certain. Moreover, it constitutes an automatic price adjustment clause in violation of Section 154.38 of the Commission's Regulations. In addition, when the agreement expires after three years, there may be pressure on Houston Gas to raise its rates in order to earn a more adequate return.

Furthermore, the 6¼% rate of return contemplated for Coastal is excessive. While financial data appearing in the record necessarily looks to the future, it would appear that with the changes that we shall require in the cancella-

tion provisions of Houston Gas' contracts, that Coastal and also Houston Gas will have assured markets under long term contracts, so that there is no reason here to allow more than a 6% rate of return. If each company finances, as we shall require, with a 15% common equity ratio, and the remainder of the capitalization is 73% in bonds with a cost of, for example, 4¾% (instead of the proposed interest rate of 4.5%) and 12% in interim notes with a cost of 5.5%, an overall rate of return for either company of 6¼% would result in a return on equity of approximately 14%, which is excessive. See *Permian Basin Pipeline Co., et al.*, 12 F.P.C. , opinion No. 249, No. G-1928, *et al.*, May 1, 1953, p. 17.

To remedy these defects in Coastal's proposals we shall require that the tariff to be filed by Coastal shall provide initially for a rate of return of 6% and that the rate of return to be used in the cost of service formula shall be recalculated every six months. The initial rate of return shall be 6%, and for succeeding six month periods shall be equal to the combined rate of return of both Coastal and Houston Gas for the preceding six months but never more than six percent.

Finally, in other matters of substance and form, the rate proposals of both Houston Gas and Coastal are improper. These defects also must be remedied as a condition to the issuance of certificates. Houston Gas' direct primary interruptible sales, constituting only 3.4% of Houston Gas' estimated deliveries of gas during its third operating year, are made under contracts which allow the buyer to cancel if the price of natural gas exceeds 95% of the cost of the other fuel used in the customer's installation. These cancellation provisions, while not affecting a substantial part of Houston Gas' deliveries, would aggravate the threat to the economic feasibility of the project inherent in the cancellation provisions of the transportation agreements. In like manner, therefore, we shall require that they be eliminated.

Houston Gas' Rate Schedule G computes a minimum annual bill by multiplying 65% of the annual contract quantity times the 55¢ rate. This method is not in accordance with regulatory practice. A minimum bill should be based at least in part upon demand, because the facilities built must be of sufficient capacity to meet peak day deliveries and should be on a monthly rather than an annual basis to avoid uncertainty as to actual charges until the end of the year.

The Staff's brief (p. 57) indicates that Houston Gas' proposed Tariff volume No. 1 is objectionable as to form under the Commission's Regulations. Since Houston Gas has given us assurance (Joint Reply Brief, pp. 42-43) that it stands ready to abide by all applicable Commission Regulations concerning the form and composition of the tariff, it may be assumed that the defects will be eliminated when it files the new tariff required herein, perhaps through suggestions from the staff in accordance with the procedure provided for by Section 154.25 of our regulations.

As to Coastal, its cost-of-service formula makes no credit for Federal Income Tax accruals in its allowance for working capital requirements. The Commission has reduced the working capital by such an item of credit in many recent cases (see for example, *South Carolina Generating Co.*, 15 F.P.C. , opinion No. 297, October 24, 1956) and in so doing, has had the approval of the courts. *State Corporation Commission of Kansas* v. *F. P. C.*, 206 F. 2d 670, 714-715 (CA 8), *certiorari denied*, 346 U.S. 922. On the basis of the schedule for paying installments of the tax, 50% of the allowable tax is the appropriate item of credit.

The tariff provision with respect to gas from Coastal's own reserves, of which none are included in Coastal's present gas supply, result in an escalation provision and are otherwise in violation of the Commission's Regulations. The agreement provides that the price for gas from such reserves shall be an area price specified in the agreement or

a higher price agreed upon between Coastal and Houston Gas where Coastal believes that it will otherwise suffer an economic loss. This arrangement is in violation of Section 154.38 of our Regulations prohibiting price adjustments effecting a modification of a rate specified in a rate schedule and in violation of Section 154.22 which requires that tariffs or parts thereof shall be filed not more than sixty days prior to their effective date.

The provision in the tariff which grants a credit to Houston Gas where Coastal removes heat content from the gas which it transports should not apply only to purchased gas, but should apply consistently also to gas from Coastal's own production, or else the credit should be removed altogether.

Because of the nature of the arrangements between Coastal and Houston Gas, as modified by the conditions we are imposing herein, we are requiring that these arrangements be set forth as a tariff. At the time the new tariff is filed any defects in form can be eliminated as the company has assured us it is willing to do in order to conform to our regulations (Joint Reply Brief, p. 41).

Financing.—Important conditions will be necessary in connection with financing the projects of Coastal and Houston Gas. However, with these conditions, we believe that the projects can be financed.

The estimated cost of Coastal's project for which authorization is requested is $54,589,000, including working capital and financing expenses. Coastal proposes to finance this cost as shown below with the capitalization ratios at the end of the construction period indicated:

First Mortgage Pipeline Bonds, 4.5%	$40,000,000	73.3%
Interim Notes, 5.5%	7,800,000	14.3
Common Stock, 678,900 shares, $1.00 par value	6,789,000	12.4
	$54,589,000	100.0%

Coastal expects that the bonds will be sold privately to a group of insurance companies under an agreement to take down the proceeds on a pre-arranged schedule, that the interim notes will be underwritten and sold to the public in "units" combined with common. Lehman Brothers and Allen & Company are prepared to enter into an underwriting agreement to undertake the sale of the units. Coastal proposes that the interim notes be either retired or converted at its option into preferred stock at the end of the fifth year. Coastal proposes to sell the common shares, which are not offered in the units, to its present stockholder, Delhi-Taylor Oil Corporation, or the latter's shareholders, at an average price of $10.00 per share.

Houston Gas has submitted plans for financing two projects. One is the construction of the transmission line for which a certificate is here requested; the other is the purchase of distributing properties as described above. Funds to finance these two projects will be obtained through the issuance of securities as follows, although the plan with respect to the distributing properties is tentative:

	Transmission		Distribution		Total	
First Mortgage Bonds	$69,375,000	72.6%	$17,000,000	54.0%	$86,375,000	68.0%
Interim Notes or Preferred Stock	14,350,000	15.0	8,055,556	25.6	22,405,556	17.6
Common Stock	11,797,500	12.4	6,444,444	20.4	18,241,944	14.4
	$95,522,500	100.0%	$31,500,000	100.0%	$127,022,500	100.0%

With respect to the transmission system, Houston Gas under present money market conditions, expects to sell the bonds at a rate of interest in excess of 4% to a group of insurance companies under a firm contract providing for delivery of the bonds against payment as required by construction. The equity capital will be derived from a general public offering of interim notes and common stock to be sold in "units." The interim notes, which

are to bear interest at the rate of 5½%, may be converted into preferred stock on or before the end of five years. It is proposed to offer, without an underwriting, common stock, other than the amount to be sold in the units, to the present common stockholders at $10.00 per share pursuant to transferable subscription warrants.

Houston Gas' financial witness was of the opinion that with the proposed equalization provisions the plan for financing the pipeline project was financially feasible. He expected that Blyth & Company would arrange all of the initial financing.

The record, however, is much less definite about the financing of the acquisition of the distribution properties, for the amount of funds necessary is doubtful principally because some of the prospective sellers have the privilege of terminating their respective agreements to sell. Furthermore, Houston Gas' financial witness doubted that all of the $31,500,000 would be provided at the time of initial financing because substantial amounts would not be required until sometime after the first and second years of operation of the distribution systems. However, using the $31,500,000 as a maximum figure Houston Gas' financial witness suggested that the requirement for funds could be met by the issuance of bonds, interim notes and common stock in the proportions set forth above.

Our principal concern with the financing proposed by the two applicants is that it does not attain a reasonable standard of safety and stability. In the past we have said that common equity should amount to at least 15% and debt securities not greater than 75% of the total capitalization. *San Juan Pipe Line Co., et al.*, 9 F.P.C. 170, 187; *Virginia Gas Transmission Corp., et al.*, 9 F.P.C. 453, 455; *Transcontinental Gas Pipe Line Corporation*, 9 F.P.C. 32, 61; *Permian Basin Pipeline Co., et al.*, 12 F.P.C. , opinion No. 249, No. G-1928, *et al.*, May 1, 1953.

We are entirely aware that economic conditions have changed since those cases were decided and we do not mechanically apply the same standards here. But we think that as a matter of discretion applied to the facts here that we should again require the 15% common equity standard. The initial capitalization here contemplated for both companies of less than 15% in equity and the remainder in debt would result in such a large portion of the income of the companies being spent for debt service as to leave very little margin for times when economic conditions are less favorable. It will be recalled that Coastal forecasts for its third year net operating revenues of only $2,671,726 compared to interest on its debt of $2,054,188 while Houston Gas estimates debt interest of $3,671,970 compared with a net operating income of only $5,122,876. The problem is particularly acute with respect to Coastal, for after the first five years of operation the amount of bonds retired each year will exceed by $174,770 the annual charge for depreciation, so that this excess amount would have to be paid out of earnings. In the order below we wil therefore provide that both companies shall file amended plans of financing to provide that equity capital shall consist of at least 15% of the total capitalization.

With respect to the interim notes we realize, as argued by applicants, that there are certain advantages in having them outstanding for a period of time such as the greater attractiveness to buyers of a longer term and the tax deduction of the interest paid. We are, therefore, not disposed in this instance, to require that they be converted immediately after construction as recommended by the staff; on the other hand, because they add to the already large percentage of debt, we shall require that no dividends be paid on the common stock until the interim notes are converted. In view of the indefinitiveness of the total amount of funds to be raised by Houston Gas for the purpose of acquiring properties in Florida and the lack of information in the record as to the nature of the financing to be em-

ployed, we will require that Houston Gas submit its complete plan for financing, prior to undertaking to put it into effect.

In making these provisions in our order, we note that the financing witness presented by Coastal testified that its project would be feasible under present market conditions, with common equity of 15%, conversion of the interim notes soon after completion of construction and allowance of a return of less than 6¼%. We are not unmindful that a witness for Houston Gas testified that if the Commission required common equity of at least 15%, it would cause a change in the plan of financing, would raise doubt that the 15% equity could be met under conditions that exist today and would require a change in the proportions of interim and common stock in the formation of the units sold.

In addition to the distribution properties for which Houston Gas has options to purchase, it proposes to resell gas to twelve existing utility gas systems, three existing municipal systems and sixteen municipal systems which do not have gas service. The testimony supports the ability of the utility systems and the existing municipal gas systems to finance their projects. In their direct testimony, witnesses for the municipalities which do not have gas systems, also support the ability of these municipalities to finance their proposed projects, but in the course of cross-examination they became non-committal because of the state of the bond market at that time. However, even if these municipalities, or some of them, are unable to finance their gas distribution projects, there is little doubt that the gas can be absorbed by the larger existing systems.

Other considerations.—Certain contentions of interveners in this case, including the New York Public Service Commission and various competing interests, may be disposed of briefly. The New York Commission complains that the prices paid for resale gas by Coastal in the Texas fields will increase the price of gas in the field to the

detriment of New York consumers receiving gas transported by the pipeline systems of Tennessee Gas Transmission Company, Texas Eastern Gas Transmission Corp. and Transcontinental Gas Pipe Line Corporation. We note that the interest alleged by the New York Commission would be only remotely affected by the determinations we are called upon to reach in this case. In any event, although the record in this case does not afford a basis for determining what the precise "just and reasonable" rate is for the gas sold by the producers, in view of all the circumstances in this case we cannot conclude that the public convenience and necessity requires that certificates should issue herein only if the rate at which the gas is sold is less than the prices proposed herein. The matter of the producers' rates is subject to our continuing supervision and control and if sufficient reason appears therefor, can be considered on the basis of a factual record developed in an appropriate proceeding under the Act.

In this connection, the producers from which Coastal proposes to purchase the volumes of resale gas have filed certificate applications to make these sales. Consistent with the authorizations herein granted, we shall by separate order in the appropriate dockets issue certificates granting the authorizations sought by those producers.

Nor do the interests of competitors compel us to deny the certificates here. The distinctive market conditions which justify permitting the use of the large volumes of gas involved here for boiler fuel have been detailed above. In this regard, this case stands alone. And although it may be that sellers of liquefied petroleum gas in the State of Florida, such as the Natural Gas Company of Florida, and the railroads, such as the Atlantic Coast Line Railroad Company and the Louisville and Nashville Railroad Company may initially suffer economic losses, it reasonably appears that increased industrial and other activity in Florida resulting from the introduction of natural gas will

yield offsetting benefits in the long run. We therefore conclude that the need and desire of the public in Florida for natural gas turns the scales against these competing interests.

Finally, it appears that the labor necessary for construction of the facilities of Houston Gas will be furnished by three construction companies the president of each of which is an official and director of Houston Gas and that two of these construction companies own blocks of Houston Gas stock. Furthermore, a member of the firm of engineers which will supervise the construction and operation of the pipeline is also a vice-president and director of Houston Gas. While as we have already stated, the cost of the proposed facilities appears to be reasonable in view of this fact, this cost will be carefully scrutinized in any future proceeding dealing with accounting or rates of Houston Gas. In addition, the record shows that a former director of Houston Gas was also, prior to his resignation from the management of Houston Gas, a director and member of the executive committee of Blyth and Company, which also owns stock in Houston Gas and will market Houston Gas' securities. In this connection we call attention to the provisions of Section 12 of the Natural Gas Act which provides in part that—

> "It shall be unlawful for any officer or director of any natural-gas company to receive for his own benefit, directly or indirectly, any money or thing of value in respect to the negotiation, hypothecation, or sale by such natural-gas company of any security issued, or to be issued, by such natural-gas company, or to share in any of the proceeds thereof, ..."

The Commission further finds:

(1) Applicants, Houston Texas Gas and Oil Corporation and Coastal Transmission Corporation, Delaware corporations, each having its principal place of business in Houston,

Texas, upon commencement of the transportation and sale of gas for which certificate authorizations are applied for herein, will be engaged in the transportation of natural gas in interstate commerce and the sale in interstate commerce of natural gas for resale and each will be a "natural-gas company" within the meaning of the Natural Gas Act.

(2) The facilities which Houston Gas and Coastal proposed to construct and operate, as described in their applications as amended, and in this opinion, for the transportation and sale of natural gas in interstate commerce, subject to the jurisdiction of the Commission, are subject to the requirements of subsections (c) and (e) of Section 7 of the Natural Gas Act.

(3) The sale of natural gas for resale by Houston Gas and Coastal, as described in their applications as amended, in this opinion, and in the appendix hereto, will be made in interstate commerce, subject to the jurisdiction of the Commission, and such sales are, therefore, subject to the requirements of subsections (c) and (e) of Section 7 of the Natural Gas Act.

(4) Applicants are able and willing properly to do the acts and to perform the service proposed by them and to conform to the provisions of the Natural Gas Act, and the requirements, rules and regulations of the Commission thereunder.

(5) The transportation and sale of natural gas by applicants, together with the operation of any facilities subject to the jurisdiction of the Commission necessary therefor, are required by the public convenience and necessity, and a certificate therefor should be issued as hereinafter ordered and conditioned.

(6) Public convenience and necessity require that the conditions set forth in paragraphs (B), (C), (D) and (E) below shall be attached to the certificates issued herein.

(7) Such arguments, contentions and objections advanced by any party to this proceeding as have not been specifically disposed of herein have been considered but are without substantial support in the record or reasonable basis in law, or should be reserved for future consideration in an appropriate proceeding.

The Commission orders:

(A) Certificates of public convenience and necessity are hereby issued authorizing applicants to construct and operate the facilities referred to in paragraph (2) above and to make the sales referred to in paragraph (3) above, subject to the jurisdiction of the Commission, for the transportation and sale of natural gas upon the terms and conditions of this order.

(B) Houston Gas shall within 30 days of the issuance of this order file with the Commission in accordance with its regulations and satisfactory to the Commission, a revised FPC Gas Tariff containing rate schedules and executed service agreements thereunder for general firm service, preferred interruptible service and transportation service for Florida Power & Light and Florida Power, in accordance with the following:

(1) The rates set forth in the tariffs for firm sales for resale, interruptible sales, and for transportation, shall be commensurate with the cost of service determined on a reasonable allocation of costs between these services in accordance with usual Commission standards and based on a rate of return of not in excess of 6%

(2) Rate Schedules and service agreements for the transportation of gas shall not include provisions for their cancellation or for reductions in take, such as those appearing in Sections 7, 22 and 38 of Rate Schedule T-1 for service to Florida Power and in Sections 7,

22, 37, 39 and 45 for Rate Schedule T-2 for service to Florida Power & Light.

(3) The minimum bill provision in paragraph (4) of Houston Gas' present rate schedule for general firm service shall be modified to provide a minimum bill that is based, at least in part, upon demand and on a monthly rather than an annual basis.

(4) Cancellation provisions appearing in Houston Gas' contracts for direct primary interruptible service shall be eliminated.

(5) Houston Gas' tariff filing shall in all other respects comply with the Commission's Regulations under the Natural Gas Act as stated herein.

(C) Coastal shall within 30 days of the issuance of this order file with the Commission in accordance with the provisions of Section 154.31 through 154.41 of its regulations and satisfactory to the Commission, an FPC Gas Tariff as follows:

(1) The tariff shall provide for charges by Coastal for services to Houston Gas based on a cost-of-service formula.

(2) The cost-of-service formula shall provide separate charges (a) for gas sold by Coastal to Houston Gas and (b) for gas transportation service rendered to Houston Gas with respect to gas transported to Florida Power & Light and Florida Power. Such separate charges shall be based on a reasonable allocation of costs between the two services in accordance with the usual Commission standards.

(3) The charges to be made for the first six month period of operation shall be based on a rate of return of 6% and the charges for succeeding six month periods shall be based on the overall rate of return of the two

companies for the preceding six months period but not more than 6%.

(4) Working capital, as computed in its cost-of-service formula, shall be credited with federal income tax accruals to the extent of 50% of the annual tax allowance in accordance with usual Commission standards.

(5) The provisions now appearing in Article VI and Article XIV, paragraph 1(b) of Coastal's Tariff for service to Houston Gas providing for an increase in the allownace made Coastal with respect to gas from its own reserves shall be eliminated.

(6) The provision now appearing in Article XIV, paragraph 1(g) of the tariff, which grants credit to Houston Gas where Coastal removes heat content from gas which it has purchased and transports shall be made to apply also to gas from Coastal's own production or else the credit shall be removed altogether.

(7) Coastal's filing shall in all other respects comply with the Commission's Regulations under the Natural Gas Act.

(D) Houston Gas and Coastal shall submit for approval prior to undertaking to put it into effect a financing plan satisfactory to the Commission. Such plan shall include copies of any proposed agreements with underwritters or others, for their respective pipeline projects, and for the acquisition of distribution properties by Houston Gas based on common equity of at least 15 percent, and bonded indebtedness of not greater than 75 percent. The balance of the capitalization may be represented by interim notes, which may remain outstanding as long as no dividends are paid on the common stock.

(F) There shall be attached to the exercise of the rights, granted Houston Gas and Coastal under paragraph (A) herein, the following conditions:

(1) The general terms and conditions set forth in paragraphs (a), (b), (c)(1), (c)(2), (c)(3), (c)(4) and (e) of Section 157.20 of the Commission's Regulations under the Natural Gas Act.

(2) All the facilities authorized in paragraph (A) shall be constructed and placed in actal operation on or before June 30, 1958.

(F) The grant of the certificates herein shall not be construed as a waiver of the requirements of Section 4 of the Natural Gas Act, or of Section 154 of the Commission's Regulations thereunder requiring the filing of rate schedules for the service herein authorized, and is without prejudice to any findings or orders which have been or may hereafter be made by the Commission in any proceeding now pending or hereafter instituted by or against the applicants. Further, the action taken in this proceeding shall not foreclose nor prejudice any future proceedings or objection relating to the operation of any price or related provision in the contracts herein involved.

By the Commission. Commissioners Connole and Kline dissenting. Commissioner Kline joins in the dissenting statement of Commissioner Connole.

/s/ J. H. Gutride,
Acting Secretary.

Connole, Commissioner, *dissenting:*

The evidence and testimony of record, all fully tested on cross-examination and rebuttal, all fully briefed and argued, discloses the inherent weaknesses in this application. The conditions found necessary in the opinion and

order of the majority confirm the fact that the project as proposed is economically impossible of completion. Even in the form which it would take if the conditions were met it would contain so many compromises with principle and rest on so much speculation for its success that the Act does not permit a finding that the public convenience and necessity requires its construction and operation.

Let one thing be clear at the outset. This statement is addressed to these particular projects, the one proposed and the one which would be created if conditions were met, and to those projects only. By no means do I oppose bringing natural gas into peninsular Florida nor do I disagree that the economy of the State would benefit from its introduction—if it could be done on an economically sound basis. But the economy most emphatically would not benefit if the project to bring it there were not economically sound. And those in issue here are not. Accordingly I am reluctantly, but inevitably, forced to dissent.

The project as proposed is plainly impossible unless the Commission surrenders all significant control over matters of regulatory concern to contractual agreement between the applicant and the customer for 60% of its service. This, necessarily, the Commission has refused to do. I do not believe it should make the gesture of offering the unacceptable alternative. I feel the certificate is unacceptable because under its terms the principal customers, the power companies, cannot be expected to go along unless the Commission makes concessions in rate making principles which I do not feel are justified at this time on this record. And if they do not go along, the project is not feasible.

The infirmities in the arrangements between the power companies and the applicants as proposed by the application are fully and clearly discussed in the mapority opinion herein. The so-called cancellation clause, however it would be interpreted ultimately by the parties, the necessary acceptance by the Commission of rates admittedly made

with no reference to the recovery of even out-of-pocket costs, the complete surrender of control by the Commission over effective rate regulation made necessary by power companies requirement that its total natural gas costs not exceed alternative fuel costs, all are plainly inconsistent with fundamental regulation. All have been rejected, as have been other proposals. I am wholly in agreement with these conclusions.

But, once having rejected the proposal, majority offers an alternative which is not a practical one, nor one which, in my opinion, would solve the problem.

The majority requires that Houston substitute a tariff filing for the contract between itself and the power companies and that the contract contain a definite rate level and be for a long-term duration. The rate level will be fixed by reference to costs incurred in making the sale as well as to the shape of the demand curve for transportation and can be changed only after appropriate filing. Presumably, the basic principle of rate making will be observed, that the rate will return at least out-of-pocket costs involved in making the sale.

The important consideration in the rate as proposed by applicants was to secure the base load of 150,000 m.c.f. per day at the best rate it could, regardless whether the rate recovered costs properly assignable to it. If Houston attempts to file such a rate in purported compliance with majority opinion, I believe that it should be and will be rejected. They may argue, as they have, that by virtue of a large volume service, unit costs of transportation for transporting the gas will be reduced to a practical level and that if resale and other customers thereby pay more than the out-of-pocket costs assignable to them, plus their share of allocated costs, even such an amount is less than such customers would pay without the help of this large customer.

The Commission has not shown it is ready to accept this theory, however, whatever value it may have as a means of enabling a new line to reach practial operating levels. Moreover, there is doubt whether utility service should ever be rendered at below out-of-pocket costs. The economic benefits accruing to those who subsidize the loss would have to be direct, measurable and demonstrably unobtainable in any other fashion before I, at least, would entertain them as bases for departing from so hard won and equitable a principle as that which precludes Commission approval of rates made below cost. The economics of the Florida market may differ so materially from those of other areas that a departure as radical as that suggested may be necessary if natural gas is to be introduced into the State. We have not been shown on this record, however, either that it is, or if it is, that the need is so great that these departures would be justified in the public interest. It may be concluded, therefore, that the rates required to be submitted will be based on costs, at least as a starting point. The requirements of the majority opinion permit no other conclusion (see paragraphs (B) and (C) of the Order).

To appraise the disparity between the proposed transportation rates and cost of transportation one need only to make a comparison of the rates proposed and a rate based on an allocation of cost of service made in accordance with the principles enunciated by the Commission in the *Atlantic Seaboard* case, Opinion No. 225. Using the Applicant's figures allocated generally in accordance with the *Atlantic Seaboard* case the transportation costs at 100% load factor would be 18.6¢ per Mcf. This compares to Applicant's proposed transportation rates of 15.5¢ to Florida Power and Light and 13¢ to Florida Power for the first two years and 11.5¢ thereafter.

It is clear that these rates, especially the transportation rate, will raise the price of applicant's service beyond economic tolerance.

Compare, for example, this 18.6¢ cost of transportation service with the third year transportation rate of 11.5¢ contemplated by the contract with Florida Power. It scarcely seems possible that rates could be filed, as the majority states "more nearly commensurate with the cost of service" and not raise total delivered costs of natural gas to the power companies so high as to render the use of natural gas prohibitively expensive. The combined fuel costs to Florida Power under its own estimates would be 22.5¢ field price plus 18.6¢ transportation, or a total of nearly 41.1¢ in order to recover all costs assignable to the service. But Florida Power has refused to agree to a contract permitting total charges of more than 34¢. On an annual basis and using Florida Power's estimated annual volume of 18,250,000 this spread amounts to $1,295,750. The spread between what the market will bear and what it would cost this system to serve that market is simply too great to be reconciled.

The power companies have made themselves absolutely clear. They are interested in natural gas only if it is cheaper than alternative fuels. And even under conditions of the application the saving to the largest company amounts to only two-tenths of one per cent of gross revenues and even this saving can easily be wiped out. An increase of prices of that fuel which the company will continue to use could eliminate it entirely. Obviously then, a rate that would eliminate even this saving, in fact actually increase the price of natural gas over that of Bunker "C" oil, could not be accepted.

To expect a major operating electric utility enjoying overwhelming domination of one of the greatest potential markets in the nation to voluntarily undertake to increase purchased fuel operating expense (and therefore rates under its fuel adjustment clause) in order to subsidize the development of the only significant competing source of energy is stretching one's confidence in corporate magnaminity to the breaking point.

Whether the Florida Railroad and Public Utilities Commission would be as enthusiastic in its support of the project if it knew that its economic feasibility and lawful certification depended on conditions which would raise electric rates throughout the major parts of the State does not appear from the record. It is significant, however, that the Florida Commission's support was for a project substantially different in every non-physical essential from that which would be created if these conditions were met.

As a broad matter of social policy, it may be bereficial for us to call on the public spirit of Florida Power and Light's and Florida Power Corporation's owners to participate in subsidizing the introduction of natural gas into Florida. As a broad matter of defense effort it may be equally praiseworthy to require those companies' owners to pay higher than necessary prices for fuel to make their fuel supply more certain. These motives, however, I do not believe are within our province to consider. These orders requiring payments in excess of the cost of alternative fuels I do not believe are within our jurisdiction to make and unless we could make such orders the existence of a natural gas pipeline in Florida would be of little value to the national defense. For as a practical matter, to supply part of the fuel requirements of a disaster interrupted oil supply, pipeline capacity would have to be available to serve them. But the record shows natural gas to power companies would necessarily have to be priced so high that the companies would not use it. Problems of cutting off deliveries to those customers which were using it in order to make delivery to the power companies are obvious.

When this transportation gas revenue is lost as it most certainly would be in view of the level to which rates would have to rise when field prices of the gas began escalating (this being a non-regulated field sale) up to 60% of capacity

would be wasted. The possibilities of making firm resale contracts for this loss are small as witness the results of applicant's promoters' efforts to secure more commitments that it did despite long and earnest efforts. Interruptible sales even in the volumes claimed by applicant would not meet the deficiency even assuming the gas were available to it and to Coastal. The record is simply silent on what might happen after the power companies switched to alternative fuels. There is speculation and expression of confidence by the promoters but of such things formal findings of feasibility are not made.

Huge volume sales of natural gas for boiler fuel are difficult enough to justify even when there is no question of availability of more abundant and less critical fuel as is the case here. But in this proceeding there will be none of the savings sometimes made available to electrical utilities purchasing boiler fuel gas and no distinguishable advantage to public interest sufficient to justify consuming some 150,000 m.c.f. per day or more in the interest of bringing natural gas into an area by this particular project. This record does not demonstrate that this project is uniquely suited to Florida or so overwhelmingly superior to any other that the nation must pay so high a price in terms of using a wasting asset needlessly, even if this project as revised by the majority decision were possible.

Summarizing my position: The project as proposed cannot be certificated. The project as approved requires a filing of a rate to be users of 60% of the capacity which it is unrealistic to expect would ever be accepted and if accepted would be used for a very short period. Considerations of public policy or national defense which might motivate acceptance are beyond our jurisdiction to consider or to implement. Therefore, as much as 60% of the line capacity would soon be unused. No firm market nor supply has been shown for that much unused capacity on this record. Accordingly, I am not persuaded that the

certificate suggested by the majority should issue for this project.

WILLIAM R. CONNOLE,
Commissioner

(Issued: December 28, 1956)

APPENDIX C

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

In the Matters of:

HOUSTON TEXAS GAS AND OIL CORPORATION	Docket G-9262
COASTAL TRANSMISSION CORPORATION	Docket G-9960

Before Commissioners: Jerome K. Kuykendall, Chairman; Seaborn L. Digby, Frederick Stueck, William R. Connole and Arthur Kline.

Order Denying Applications for Rehearing, Accepting Tariffs, Rejecting Service Agreements, Denying Stay, and Denying Appeals From Secretary's Actions

(Issued February 21, 1957)

By opinion No. 301 and accompanying order, issued December 28, 1956, certificates of public convenience and necessity were issued under the Natural Gas Act (Act) to Coastal Transmission Corporation (Coastal) and Houston Texas Gas & Oil Corporation (Houston Gas), authorizing the construction and operation of a joint pipeline project extending from Texas to Florida to supply Florida consumers with natural gas. As more fully set forth in that opinion and order, a number of conditions were attached to the certificates issued, imposing requirements relating principally to the rates and financing arrangements of Houston Gas and Coastal. Among other matters, it was

required that these parties, within 30 days of the issuance of the order, file revised tariffs satisfactory to the Commission and in accordance with its regulations and the standards it has heretofore applied.

On January 24, 1957, Houston Gas filed an application for rehearing of the aforesaid opinion and order, setting forth that the parties have substantially complied with certain of the conditions imposed by opinion No. 301 and accompanying order, and requesting that the remaining conditions be set aside as no longer necessary, as undesirable, or as *de minimis* in character, and requesting a limited rehearing to these ends.[1] Likewise, on January 24, 1957, in purported compliance with the conditions imposed, Coastal and Houston Gas submitted their revised tariffs, consisting of Coastal's FPC Gas Tariff Original Volume No. 1, and Houston Gas' FPC Gas Tariffs Original Volumes Nos. 1 and 2. In addition, Coastal submitted an executed service agreement between it and Houston Gas. Also, Houston Gas submitted copies of service agreements with 22 of its proposed 34 customers in partial compliance with paragraph (B) of the Commission's order. Various supporting materials were also submitted. On February 12 and 13, 1957, in order to achieve fuller compliance with the conditions, Coastal submitted 12 revised tariff sheets and a superseding service agreement. Similarly, Houston Gas, on January 31, 1957, filed a substitute Original Volume No. 1 containing several changes to conform the tariff with the Commission's rules. These rate filings as amended are before us now.

Additionally, applications for rehearing of opinion No. 301 and accompanying order in opposition to the certificates as granted to Coastal and Houston Gas were filed on January 28, 1957, by the Florida Economic Advisory

[1] In addition, Houston Gas requested a stay of opinion No. 301 and accompanying order pending final determination of its application for rehearing.

Council; by the Atlantic Coast Line Railroad Company and the Louisville and Nashville Railroad Company; and by the Public Service Commission of the State of New York.

On the basis of the record in this case and the filings submitted by Coastal and Houston Gas, we are able to conclude that the requirements of the basic conditions respecting the rate filings have been met, subject to the parties' compliance with the particulars we shall hereinafter enumerate. In regard to these last, it is in the public interest that additional time beyond the 30 days allowed in opinion No. 301 and accompanying order be permitted Coastal and Houston Gas for satisfying the remaining requirements which we consider must be fulfulled. As indicated, we are here concerned with the rate conditions alone, contained in our order in paragraphs (B) and (C) and the subparagraphs thereof. The financing conditions in paragraph (D), as well as various general conditions, are not in issue at this time and of course remain to be satisfied for compliance with opinion No. 301 and accompanying order.

Accordingly, the tariff filings of Coastal and Houston Gas designated above should be accepted for filing, subject to these parties complying with the requirements which remain. To this end, we shall grant an additional 30 days for Coastal and Houston Gas to meet those requirements, as they are set forth in the instant order, and to accept the certificates issued them. In view of the foregoing, there is no necessity for the rehearing requested by Houston Gas, and its application therefore shall be denied. Likewise, we shall deny its request for stay of opinion No. 301 and accompanying order.

As to the applications for rehearing of opinion No. 301 and accompanying order, filed by the railroad and other interests mentioned above for the reasons subsequently set forth, we conclude that they should be denied.

It is necessary only to summarize the substantial particulars wherein the parties have complied with the conditions imposed in opinion No. 301 and accompanying order, our chief concern at this time being to point out the requirements which remain to be met. Considering the case of Coastal first, proposed FPC Gas Tariff, Original Volume No. 1, contains two rate schedules, S-1 covering the sale of gas to Houston Gas and T-1 covering the transportation for Houston Gas of gas purchased by Florida Power Corporation and Florida Power and Light Company in Louisiana and Texas, respectively, for use in their own power plants in Florida. The proposed rate schedules contain the usual cost-of-service formula rates which reflect a 50% credit to the claimed working capital for federal income tax accruals and a rate of return of 6%. Such return, however, is to be adjusted to reflect the combined actual return of Houston Gas and Coastal during a "development period," extending until an appropriate tariff change is accepted by this Commission and any requisite authorization under Section 7 of the Act obtained. The new rate schedules do not contain the provisions which we required to be eliminated by paragraphs (C)(5) and (C)(6) of our order relating to an increase in the allowance made Coastal with respect to gas from its own reserves and a credit to Houston Gas where Coastal removed heat content from gas which it has purchased. To the extent outlined above Coastal's tariff filing conforms to the conditions imposed by paragraph (C) of our order, but other aspects must be considered.

In making its allocation of costs between the sales and transportation services Coastal utilized in its contract formula a billing demand which allocates a minimum of demand costs to transportation and a maximu to the sales service. The billing demand under the transportation rate schedule is the minimum daily transportation obligation. Under the sales rate schedule it is the difference between the maximum daily contract obligation for both services

to Houston Gas and the minimum transportation obligation. This method departs from the usual Commission practice of establishing demand units for allocation purposes on the basis of deliveries during the peak period, and during, at least, the first and second years of operation, will give preference to transportation service if such service is not required to be curtailed during peak days. Therefore we accept Coastal's tariff subject to its filing revised tariff sheets showing that demand costs will be allocated between the two services for the second year of operations and thereafter, on the basis of average deliveries under the two services during the three-day sustained peak period of the preceding 12 months.

The form of service agreement which is part of Coastal's tariff provides that the seller and buyer or either of them may propose such changes and only such changes in seller's tariff "as Buyer and Seller have agreed upon and which are set forth hereinbelow . . . ." In the form of service agreement no conditions for the filing of changes are set forth, while Section 154.38(d)(3) of the Commission's Regulations requires that the service agreement set forth the "specified conditions" under which a change may be filed. Accordingly, the present language of the form of service agreement is not allowable and revised tariff sheets should be filed enumerating the conditions, if any, under which rate changes may be proposed.

In Coastal's executed service agreement with Houston Gas entered into on January 24, 1957, it is provided that nothing shall operate to affect obligations under the Gas Service agreement between Coastal and Houston Gas dated July 19, 1956, and, with respect to the filing of changes, it is provided that seller and buyer may each propose only such changes as are related to or necessary for the effectuation of the terms of the 1956 agreement. These provisions thus incorporate a document outside the present filing and render the conditions under which a change may

be filed without clear definition in violation of our Regulations. Accordingly, we shall reject the tendered service agreement and require that Coastal submit an acceptable service agreement at least 30 days prior to the commencement of service.

Houston Gas' proposed FPC Gas Tariff, Original Volume No. 1, contains Rate Schedule G, covering general firm service at a rate of 55 cents per Mcf, and preferred interruptible service at 33 cents per Mcf, which are the same rates presented in evidence in the certificate hearings. The minimum monthly bill under the G rate schedule is equal to 50% of the buyers' elected portion of the annual contract quantity applicable in the month multiplied by 55 cents per Mcf, instead of a minimum bill based on demand as required by paragraph (B)(3) of our order. The cancellation provisions have not been eliminated from the contracts with the direct primary interruptible customers as required by paragraph (B)(4) of our order.

Houston Gas' FPC Gas Tariff, Original Volume No. 2, consists of Rate Schedules T-1 and T-2, which are special agreements with Florida Power and Florida Power and Light, respectively, covering the transportation of gas at a rate of 13.5 cents per Mcf to Florida Power and 17.5 cents per Mcf to Florida Power and Light. The proposed transportation rates represent an increase of two cents per Mcf over the rates presented in the certificate proceedings and will increase Houston Gas' revenues during the third year's operation by $1,095,000. Some of the cancellation provisions which we discussed in our previous order and whose elimination we required by paragraph (B)(2) of that order have been eliminated but others, as discussed below, are retained.

In support of its proposed rates Houston Gas has submitted cost-of-service data reflecting a 6% rate of return on its own facilities, as well as Coastal's. Houston Gas' costs, together with those of Coastal, have been allocated

on the basis of estimated single peak-day demands, annual volumes and number of delivery points, and a cost computed for each category of service to be performed by Houston Gas. On the basis of this data, and applying the usual Commission standards, it would appear that while the proposed rates for each type of service will yield something less than six per cent rate of return, they will produce such revenues as to render the project economically feasible. It may be, of course, that actual experience will present a different picture with respect to these rates. Further, if the capacity of the proposed system is substantially increased the transportation costs may be altered. However, for the purposes of these proceedings, we will accept these rate levels without prejudice to any findings we might make in a future proceeding.

With respect to the requirements of our order as to the minimum bill provision and the elimination of the cancellation provisions in Houston Gas' contracts for direct primary interruptible service, on the basis of the materials submitted, and the substantial compliance which has been made in other particulars, it is consistent with the public convenience and necessity that Houston Gas be relieved of the necessity for compliance with these two requirements. With respect to the minimum bill requirement Houston Gas points out that the market conditions in Florida are atypical in that the load factor is very low in individual resale markets because of the mild climate; and that a relaxation of our usual standards in this respect would avoid penalizing consumers. The proposed annual minimum may be accepted since under its provision the customer pays for 50% of the annual contract purchases from Houston Gas instead of 65% originally proposed, and the customers will allocate the annual payment among the 12 months so as to correspond with maximum and minimum monthly purchases and thus mitigate any penalty effect under the original annual minimum bill.

With respect to cancellation by the interruptible customers, Houston Gas points out that such interruptible sales constitute but 3.4% of its proposed gas deliveries so that when and if all the cancellation provisions as we require are eliminated from the transportation contracts, the provisions in the interruptible contracts would have a de minimus effect, and that renegotiation of the contracts with the buyers, many of whom are municipalities, would cause an untoward delay. On this basis and in view of the demand for gas service shown by the record we are willing to relieve Houston Gas of the necessity for compliance with this requirement of our order.

The result of these considerations is that we are able to accept, as described, Houston Gas' Original Volume No. 1. It is with the transportation rate schedules in Original Volume No. 2 and Houston Gas' service agreements with some of its proposed customers in Florida that we have difficulty.

The two transportation rate schedules were filed to meet the requirements of paragraphs (B) and (B)(2) of our order specifying that Houston Gas should file a revised FPC Gas Tariff containing rate schedules and executed service agreements for transportation service, among others, with the elimination of provisions for cancellation or reduction in take. These rate schedules are filed in the form of agreements rather than in the form contemplated by Section 154.26 for inclusion in a tariff. Houston Gas requests that these agreements be received as special rate schedules under the provision of Section 154.52 of our Regulations, citing their difficulties in obtaining agreement in any other form with their customers. In view of this situation, and the fact that they do constitute special operating arrangements, we are willing to receive the transportation rate schedules in contract form.

The chief difficulty with these agreements is that they will may contain conditions relating to cancellation. Para-

graph 38 of Rate Schedule T-1 and paragraphs 39 and 44 of Rate Schedule T-2 provide that in the event Houston Gas transports gas for a third party to a point in Florida east of the Appalachicola River at a more favorable rate, and such rate is permitted by the Federal Power Commission, then the power companies shall be "entitled" to such more favorable rate. There is then set forth the criteria by which it is to be determined whether such rate to a third party is more favorable. It appears that these provisions may be construed so as to give the respective Florida utilities the privilege of deciding when Houston Gas is performing service at a lower rate for a third party even though this lower rate has the approval of this Commission, and thus of determining when they are entitled to receive the benefit of the lower rate.

The language of paragraph 38 of the T-1 rate schedule and paragraphs 39 and 44 of the T-2 rate schedules are ambiguous and need clarification to make it clear that any change in such rate shall be subject to our determination and the respective rate schedules shall not be cancellable in the event a rate change is permitted to become effective by the Commission. We shall require that the T-1 and T-2 rate schedules be made clear to provide that the utility transportation customers shall not have the right to cancel on the ground that Houston Gas is performing transportation service at a lower rate for a third party even though such rate is not offered to the power companies, nor on the ground that the transportation rates under Rate Schedules T-1 and T-2 are lawfully changed.

The elimination of the cancellation provisions from the tariff will in no way adversely affect Houston Gas. Nor do we believe that the power company customers will suffer any substantial detriment by reason of the elimination. Actually, it appears that any benefits which might be thought to inure to the power companies under these provisions are in fact illusory and non-existent. Any rates

charged by Houston Gas for jurisdictional service to any parties other than the power companies could only be just and reasonable, as fixed by this Commission in accordance with the Act. And the power companies themselves are also entitled to only just and reasonable transportation rates, likewise fixed by the Commission under the Act. Thus under the law there is no basis on which the power companies could assert or sustain any right to some lower rate which some other party was paying, merely by reason of that fact alone, nor could we allow such lower rate on such a basis. On the other hand, the power companies might well be entitled to a rate as low as or lower than that charged some other party, but only on the basis of a showing that it was just and reasonable under the Act. Accordingly, the cancellation provisions cannot and do not add anything to the rights the power companies have under law, which rights are fully protected by the provisions of law.

Also, Houston Gas' Rate Schedules T-1 and T-2 are not in conformity with the Commission's Regulations because they (1) contain automatic rate changes which are prohibited by Section 154.38 and (2) refer to other contracts to determine the obligations for the transportation service in a manner inconsistent with Section 154.11. Included in these categories in Rate Schedule T-1 are a tax adjustment provision in paragraph 22, and a reference to gas purchase contracts in paragraph 37; and in Rate Schedule T-2 references to gas purchase contracts in paragraphs 14 and 38, subrogation to rights under the gas purchase contracts in paragraph 24(a) and a tax adjustment provision in paragraph 24(b). We shall accordingly accept Rate Schedules T-1 and T-2 subject to the elimination of these provisions or their expression in a manner conforming to the Regulations.

Coming to the service agreements, Houston Gas has submitted copies of such agreements with 22 of its proposed

34 customers in partial compliance with paragraphs (D) and (D)(1) of the December order. Since the agreements are not in the form contained in the proposed tariff (Volume No. 1), and as Houston Gas states that if the Commission accepts its proposed tariff it will promptly execute and file proper agreements, these 22 agreements should be rejected because they cannot become applicable to the proposed service.

Turning to the applications for rehearing of the Atlantic Coast Line Railroad Company and the Louisville and Nashville Railroad Company, and the Florida Economic Advisory Council, a principal objection by these parties to the issuance of the certificates as conditioned is that, by the imposition of the conditions the Commission has "completely altered" the economic and financial aspects of the project, by requiring a "complete change" in the rate structure on which the availability of the proposed market is based, and that there is no evidence to support the findings made in certificating the changed projects.

We conclude that these contentions are without merit and should be rejected. They appear to be grounded on a fundamental misconception of the source of the Commission's authority to impose the disputed conditions. No party can question the Commission's power under section 7(e) to "attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require," as the Act in terms provides. Clearly, under the statute, the only hearing required to support the imposition of a condition which is reasonable and required by public convenience and necessity is the specific and ony hearing for which the pertinent section makes provision—the hearing on the certificate application. That hearing was had, and was full and adquate.[2]

[2] In fact, the only challenge made thereto has to do not with the trial aspect of the hearing, but with the decisional aspect, error

The record was extensive and on the basis of it the Commission could either accept the project as proposed or at its discretion impose the reasonable conditions the public convenience and necessity required to bring the tariff and financing proposals into conformity with the Act's standards. We chose the latter course.

Thus the only grounds for complaint which even arguably exist are that the conditions imposed are not reasonable or required by the public convenience and necessity—an argument which applicants nowhere explicitly make. Be this as it may, however, it is clear that judged by both general requirements of law and the standards previously applied by the Commission in imposing conditions, for the reasons set forth in opinion No. 301, the conditions imposed meet all such requirements. The conditions imposed in this case are no more extensive—although perhaps more specific and detailed—than the rate and financing conditions we have routinely imposed over the years.

In any event, the plain fact is that the projects as certificated including conditions are not "completely changed" nor are they "new projects." In a substantial preponderance of basic particulars, they are essentially the projects for which application was made. No change has been made in the sources of gas supply, the construction of route of the joint pipeline, the volumes of gas to be transported or the customers and markets to be served, nor is there changed the system of contractual relationships by which Coastal purchases approximately 100,000 Mcf per day from the producers, sells it to Houston Gas, which in turn sells it to the industrial and resale customers in Florida and by which Coastal and Houston Gas transport some 150,000 Mcf per day for the account of Florida Power & Light and

being asserted with respect to the shortness of time within which the case was decided, and the omission of the intermediate decision procedure. These matters are disposed of hereafter in this order.

Florida Power. The requirements that Coastal's rate of return be based on the over-all rate of return of the two companies for an indefinite rather than a limited period, that the rates of Houston Gas be commensurate with the cost of service, and that the cancellation provisions be eliminated from the transportation agreements, do not create a project so different that the requirements of law need be enlarged upon and the hearing transcript of some 8,000 pages be extended, particularly in view of the countervailing considerations of the public convenience and necessity set forth in our opinion. The same would apply to our requirements with respect to the capital ratios in financing the project and the treatment of the interim notes, which by our order may remain outstanding as long as dividends are not paid on the common stock. As stated, these conditions are no more extensive, although perhaps more detailed, than those we have imposed in many cases.

Further, to the extent it may be said that the certificated projects depart from the authorizations sought, all parties are or should be informed of the standards which we have applied in certificate cases and no claim of surprise at the imposition of the conditions can tenably be made. Nor is there any iron-clad rule that the authorization granted cannot vary from the terms of the application. See *C. A. B.* v. *State Airlines*, 338 U.S. 512, 577. There the Supreme Court upheld the award of a certificate differing materially from the authorizations sought, even though the modifications were imposed without any recourse to statutory provisions expressly authorizing the imposition of conditions such as those relied on in opinion No. 301 and accompanying order. *A fortiori*, such differences as may exist in this case are within the Commission's authority to impose.

Parenthetically, it may be observed that accepting for the moment the foregoing argument that the conditions imposed change the projects, relieving Houston Gas of the necessity for complying with some of the requirements of

those conditions as set forth above likewise removes to such extent the ground for complaint on this score.

The various arguments on the part of the Florida Economic Advisory Council and the two railroads that our findings with respect to certain aspects of the projects as gas supply, markets, costs and other matters are unsupported by the evidence are sufficiently answered by our opinion No. 301. While the railroads contend that the supply of gas to Coastal is insufficient to meet its resale obligations on the peak day because of contractual limitations, this appears to be a misinterpretation of the effect of certain exhibits. The record shows that the supplies of gas made available under all of Coastal's contracts with its suppliers, taken together, will be sufficient to meet the peak requirements of Coastal for resale and other gas in the amount of 278,000 Mcf per day. It is also argued that speculation is involved in our findings of the prospect of additional markets, of the likelihood of increased demands and the consequent economic betterment of the projects, of the prospect of industrial and social benefits resulting from the introduction of natural gas into Florida offsetting such losses as these interests might experience, and similar matters, since these are things which pertain largely to the future and have no demonstrable basis in existing conditions. Of course, our basic determinations are rooted in evidence adduced at the hearing, and relate to matters the subject of proof. But the law does not require that we close our eyes to the insights resulting from two decades of regulatory experience in a developing industry. Knowledge so gained provides a proper and helpful frame of reference in reaching an informed judgment on the concrete problems of today. Further, it should be kept in mind that, consistent with the provisions of Section 7(e) of the Act, we should consider not just the present but the future public convenience and necessity as well. See, *e.g.*, *American Air lines* v. *C. A. B.*, 192 F. 2d 417, 420-421.

But it is said we did not make specific findings on the extent of the losses which competing fuel interests would sustain, nor were findings made on other matters, such as the extent of Commission jurisdiction over the producers selling to the power companies. It is obviously impracticable for findings to be made with respect to each and every assertion made and issue sought to be raised, nor does the law impose any such requirement. It is sufficient, we consider, that we make the findings, subsidiary and ultimate, on those issues involved in applying the applicable standards of law which the facts of record clearly raise and which are really material to decision in the case. We consider that this has been done. The matter of losses to competing fuel interests was considered and our findings, which we here reiterate, of over-balancing public benefits resulting from the authorizations granted sufficiently dispose of this matter. As to such claimed jurisdictional questions as whether the producers selling to the power companies engage in jurisdictional services which must be certificated, the record is insufficient to permit such determinations which may, in any event, be more appropriately made in another proceeding where the facts are more fully developed.

The Florida Economic Advisory Council and the railroads also argue that the Commission's decision was reached so quickly that the Commission had sufficient time to consider the case full and with due diliberation. Thus in this case we encounter the novel situation of parties complaining not of administrative delay but of administrative dispatch. However, we find the Complaints unjustified, if unusual. One of the premier attributes of the administrative agency has been its flexibility and capacity for expeditious action, when the circumstances require. There is no need to detail the special actions taken in this case to insure that, consistent with a proper consideration of the case, as prompt a decision as possible be reached. It is sufficient that we are satisfied that this case received con-

sideration as full and careful as it would if dealt with on a routine basis.

Nor is there merit to the objections to the omission of the intermediate decision procedure in this case. The requisite statutory findings were made and are supported by the facts. The Commission's functions obviously would fail of effectuation if proposed projects of the extent and importance of these were permitted to die by reason of Commission inaction without ever reaching the merits, where the law in such exigent circumstances explicitly provides an avenue for taking action and reaching a decision.

In contrast to the other applicants, the New York Commission, instead of condemning the certificates as unlawful on account of the conditions imposed, seeks the imposition of a further condition requiring Coastal to renegotiate its contracts with its suppliers to provide for "an initial price no higher than the present going price in the Gulf Coast area of Texas" where Coastal proposes to acquire its gas, contending that the prices to be paid for natural gas in the field by Coastal are above those currently being paid by interstate pipeline companies, and will trigger escalation clauses in existing contracts.

The New York Commission's requested condition must be denied, as must be its application for rehearing, and its contentions rejected. The record in this proceeding affords no adequate basis for determining what is the going price in the numerous and unrelated areas scattered throughout the Texas and Louisiana coastal areas from which Coastal buys gas, nor whether there is any such single price applicable to such gas, nor indeed whether such data would suffice. Further, we are not required in circumstances like these to consider the remote and conjectural future effect, if any, of the purchases of gas by Coastal and Houston Gas in the Gulf Coast area, on the price of gas in the State of New York, many miles from Florida, and served by different pipeline companies. See *Memphis Light, Gas*

and Water Division v. *Federal Power Commission*, No. 12837, C.A.D.C., decided February 14, 1957.

Reverting for a moment to an argument of the Florida Economic Advisory Council somewhat related to the foregoing, this party contends that a "fatal defect" of opinion No. 301 and accompanying order is its failure to find whether the rates to be paid by Coastal to its suppliers are just and reasonable. It is sufficient to note that a proceeding on a certificate application is not intended to and cannot take the place of a proceeding under Sections 4 or 5 of the Act, as we have heretofore held.

A detail remains. The Florida Economic Advisory Council filed, in addition to its application for rehearing of opinion No. 301 and accompanying order which was considered and is discussed above, a so-called "answer" to the application of Houston Gas for rehearing of opinion No. 301 and accompanying order, also referred to above. Likewise, Green's Fuel, Inc., an intervenor, submitted a like "answer" to Houston Gas' application for rehearing and a "response" to the rate filings of Houston Gas and Coastal. Both of these instruments were rejected for filing by the Secretary, the parties being advised by letters dated February 6, 1957, that the tendered filings were "not acceptable because there is no provision in the Commission's Rules for the filing of answers to applications for rehearing." Both the Florida Economic Advisory Council and Green's fuel, Inc. have now filed additional documents requesting that we reverse the Secretary's action.

These requests we consider should be denied. The above filings were properly rejected. The Commission's Rules make no provision for the filing of answers to applications for rehearing, and properly so. To permit such answers, giving rise in turn to requests for opportunity for replies thereto, would complicate and prolong proceedings before the Commission, would unduly delay finality of decision,

and would be inconsistent with the Commission's timely execution of its functions. Nor does the rejection of these filings deny opportunity for hearing. As fully discussed above, the hearing required on the conditions was that recorded—namely, the hearing on the certificate applications themselves. On the basis of the record of that hearing, opinion No. 301 and accompanying order containing the conditions was issued. The parties had opportunity to file applications for rehearing of that order, even though Green's Fuel, Inc. did not choose to take advantage of it. We do not consider that the law imposes any further requirement in this regard, nor have good grounds been shown for permitting any further pleadings of the kind sought to be filed. And here again, as we pointed out above, the so-called modifications to the Commission's order, consisting of relieving Houston Gas of compliance with a few of the requirements in the conditions, likewise removes any cause for complaint on this ground, since to this extent the certificates issued are even more fully in accord with the authorizations requested, concerning which full opportunity for hearing was had.

The Commission further finds:

Such specifications of error, contentions and arguments contained in the above-described applications for rehearing as are not specifically disposed of in the foregoing are without substantial support in evidence or reasonable basis in law or are immaterial to the correct decision of this case and should be denied.

The Commission orders:

(A) The applications for rehearing filed by Houston Gas, by the Florida Economic Advisory Council, by the Atlantic Coast Line and the Louisville and Nashville Railroad, and by the Public Service Commission of New York are hereby denied.

(B) Houston Gas is hereby relieved of the requirements of paragraphs (B)(3) and (B)(4) of the Commission's order issued December 28, 1956, in view of the terms of its FPC Gas Tariff, Original Volume No. 1, filed in revised form on January 31, 1957, and the explanation submitted.

(C) Houston Gas' FPC Gas Tariff, Original Volume No. 1, as submitted in revised form on January 31, 1957, is hereby accepted for filing as in conformity to paragraphs (B) and (B)(1) of the Commission's order issued December 28, 1956.

(D) Houston Gas' FPC Gas Tariff, Original Volume No. 2, as submitted January 24, 1957, is hereby accepted for filing, with Rate Schedules T-1 and T-2 considered as special rate schedules as provided for in Section 154.52 of the Regulations, as in conformity with paragraphs (B) and (B)(1) of the Commission's order issued December 28, 1956, provided that within 30 days of the issuance of this order Houston Gas submits satisfactory revisions or clarifications to Rate Schedules T-1 and T-2 in the form of substitute rate schedules or substitute sheets, fully complying with the conditions specified in paragraph (B)(2) in the following respects:

(1) The language of paragraph 38 of the T-1 rate schedule and paragraphs 39 and 44 of the T-2 rate schedule shall be clarified to show that any change in such rate shall be subject to our determination, and the respective rate schedules shall not be cancellable in the event a rate change is permitted to become effective by the Commission.

(2) Provisions in Rate Schedule T-1, particularly paragraphs 22 and 37 and Rate Schedule T-2, particularly paragraphs 14, 24(a), 24(b) and 38, which contain automatic rate changes or references to other documents shall be eliminated or rephrased and expanded in conformity to the Commission's Regulations.

(E) Coastal's FPC Gas Tariff, Original Volume No. 1 as submitted January 24, 1957, with revised sheets submitted February 12 and 13, 1957, is hereby accepted for filing as in conformity with paragraph (C) of the Commission's order issued December 28, 1956, provided that within 30 days of the issuance of this order Coastal submits revisions to its tariff to comply with the following:

(1) Original Sheet No. 49 shall be modified to set forth the conditions under which rate changes may be made.

(2) Rate Schedules S-1 and T-1 shall be revised to provide that after the first year of operations demand costs applicable to Rate Schedule S-1 and Rate Schedule T-1 shall be in direct proportion to average deliveries under the respective schedules during the greatest three-day period of deliveries by Coastal to Houston Gas during the preceding 12 months.

(F) Houston Gas' service agreements with its Florida resale customers' are hereby rejected; Houston Gas shall be required to file executed service agreements with all its resale customers within 60 days of the issuance of this order.

(G) Coastal's executed service agreement with Houston Gas submitted in revised form February 13, 1957, is hereby rejected; Coastal shall submit a service agreement consistent with the Regulations and acceptable to the Commission at least 30 days prior to the commencement of service.

(H) The stay of the Commission's order issued December 28, 1956, requested by Houston Gas in its application for rehearing is hereby denied, except insofar as the time for filing tariffs and service agreements has been extended, provided that Houston Gas and Coastal shall have 30 days from the date of issuance of this order within which to accept the certificates issued by order of December 28, 1956.

(I) The filings with respect to tariffs, rate schedules and service agreements required herein shall in all other respects comply with the Commission's Regulations under the Natural Gas Act, and no other changes shall be made in such filings except those specified herein without approval of the Commission.

(J) The appeals filed by the Florida Economic Advisory Council and Green's Fuel, Inc. to the rejection by the Secretary of this Commission of their answers to the application for rehearing filed by Houston Gas are hereby denied.

By the Commission.

Commissioner Connole concurring in separate statement.

/s/ Joseph H. Gutride,
Secretary.

Connole, Commissioner, *concurring:*

I concur in the issuance of this certificate because the present contracts between the producers and the Power Companies make reasonably certain that the volumes proposed for sale to those customers in fact will be taken. As a result of these revisions, the contracts and accompanying rate schedules of Applicants will have been revised to eliminate the objectionable features, such as cancellation, which I protested in my separate statement in Opinion 301.

But for these revisions in the contracts between producers and Power Companies the conditions urged by the majority could never have been negotiated, and if negotiated, still would have failed to make the project economically possible of completion.

The revisions which make the project feasible were not suggested nor could they have been suggested in Opinion

301, since they were contained in contracts beyond our jurisdiction. Knowing this, and knowing that without some such fundamental change in the nature of the project, the project was doomed, I was unable to agree that certification was possible on the terms proposed by Applicants or the majority. Events have vindicated that position.

The renegotiated contracts will provide that the price of gas to Power Companies will, "escalate upwards and downwards with each change, of any amount, in the price of Bunker 'C' fuel oil". The original contracts specified an initial price unrelated to price of competing fuel and provided for upward escalation only. Thus, one of the two basic components of Power Companies' total cost of gas has been tied to that of competing fuel. The significance of this revision cannot be overemphasized.

In addition, producers have agreed that they will absorb one half of any increases to be incurred by Power Companies in the remaining component of their total gas cost. That component is the transportation charge paid to Applicant pipelines.

Since the relation between total cost of gas to Power Companies, on the one hand, and costs of competing fuel, on the other, seems to leave ample cushion to absorb one half of the reasonably foreseeable increases in transportation charges, it is now possible for Power Companies to contract for an extended period, to agree to the elimination of cancellation clauses and otherwise to conform their contracts with the pipeline Applicants to the conditions laid down by the majority. Thus the revisions in the Applicants' contracts were the result of the revisions in the producer-Power Companies contracts. Alone, the Applicants' revisions would have been insufficient.

Since neither this, nor any other regulatory authority would have had the jurisdiction to compel the changes which will make the project feasible, I could not vote with

the majority at the time it issued its Opinion. Now that events beyond the scope of this Commission's Order and authority have occurred to make it feasible however, I find the project, as here amended, is required by the public convenience and necessity.

A word of caution must be introduced however. For it is still within the realm of remote possibility that one half of any increases in transportation costs properly chargeable to Power Companies will increase the total costs of gas to those customers above the cost of competing fuels. This chance is so slim, however, in view of the expanding market for Applicants' gas, that the countervailing elements of public interest outweigh it. It is a risk which I feel is worth taking, in the name of enlightened public regulation.

WILLIAM R. CONNOLE,
Commissioner

[Docketed March 5, 1957 FPC]

FEDERAL POWER COMMISSION
Washington 25

Docket No. G-9267
Houston Texas Gas and Oil Corporation
Docket No. G-9260
Coastal Transmission Corporation

Gentlemen:

Enclosed is a correction to paragraph four in Commissioner Connole's separate concurring statement accompanying the Commission's order issued February 21, 1957, the above-designated matters.

Very truly yours,

/s/ J. H. GUTRIDE
Secretary

MEMORANDUM TO FILES:

Correction w/transmittal letter sent to all parties receiving Order of 2/21/57. See service of this date (2-21-57).

DC-37
cc: OGC
MRH :h
3/4/57

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Docket No. G-9262
Docket No. G-9360

In the Matters of

Houston Texas Gas and Oil Corporation

Coastal Transmission Corporation

For paragraph four in Commissioner Connole's concurring statement substitute the following:

The renegotiated contracts will provide that, from the commencement of deliveries, the prices for gas to Power Companies will "escalate upwards and downwards with each change, of any amount, in the price of Bunker 'C' fuel oil" from base prices of 16.5¢ and 20.5¢ per MCF. The original contract of Florida Power Corporation had provided for a variation in price level in the same manner but, from a base price per MCF of 21¢ during the first two years and 22.5¢ thereafter. The contract with Florida Power and Light had used a base price of 18.5¢, without periodic escalation. Thus one of the two basic components of Power Companies' total cost of gas not only is tied to that of competing fuel immediately but, in addition, the base price has been reduced by 2¢ per MCF. The significance of this revision cannot be overemphasized.

/s/ WILLIAM R. CONNOLE
William R. Connole,
Commissioner

February 28, 1957

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Docket No. G-9262
Docket No. G-9960

In the Matters of

Houston Texas Gas and Oil Corporation

Coastal Transmission Corporation

ERRATA NOTICE

March 8, 1957

Order Denying Applications for Rehearing, Accepting Tariffs, Rejecting Service Agreements, Denying Stay, and Denying Appeals From Secretary's Action

(Issued February 21, 1957)

Page 1, line 4: Change "&" to "and"

Page 1, line 5, par. 2: Change "*de minimus*" to "*de minimis*"

Page 2, line 6 from bottom: Change "therefore" to therefor"

Page 5, line 6 from bottom: Change "*de minimus*" to "*de minimis*"

Page 6, line 1, par. 3: Change "will" to "still"

Page 6, line 5, par. 3: Change "Appalachicola" to "Apalachicola"

Page 8, line 12, par. 2: Insert "2" in " /" and designate footnote "2"

Page 13, line 5 from bottom: Insert comma after "37"

Page 14, lines 2 and 3 in par. (I): Change last word on line 2 to read "Com-" and begining of next line to read "mission's"

/s/ J. H. GUTRIDE
Secretary

DC-37

APPENDIX D

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Jerome K. Kuykendall, Chairman; Seaborn L. Digby, Frederick Stueck, William R. Connole and Arthur Kline.

Docket No. G-9262
Docket No. G-9960

In the Matters of

Houston Texas Gas and Oil Corporation

Coastal Transmission Corporation

Order Denying Appeal From Secretary's Action
(Issued April 18, 1957)

On April 4, 1957, the Florida Economic Advisory Council filed an appeal from the action of the Secretary of this Commission taken by letter of March 29, 1957, in rejecting the Council's petition for rehearing tendered March 25, 1957, with respect to the Commission's order issued February 21, 1957. This order, among other things, denied applications for rehearing of the Commission's opinion No. 301 and order issued December 28, 1956, which granted, subject to conditions, certificates of public convenience and necessity to Houston Texas Gas and Oil Corporation and Coastal Transmission Corporation.

The conditions set forth in the December 28, 1956, order were comparatively detailed rate and financial conditions for both Houston Gas and Coastal, including requirements for the filing of tariffs in compliance therewith. In our order of February 21, 1957, we relieved Houston Gas of compliance with certain conditions, accepted tariffs submitted by the two companies provided certain specified revisions were filed and rejected service agreements submitted by each of them requiring that they file revised service agreements. The Commission's order of February

21, 1957, was on applications for rehearing and any further objection to the order of December 28, 1956, should more properly be raised in a petition for court review, rather than through the series of filings resorted to by the Florida Economic Advisory Council. The Council's petition of March 25 was properly rejected, and its filing of April 4 is nothing more than a consecutive petition for rehearing. In the meantime the 60 days allowed under Section 19(b) of the Natural Gas Act for filing a petition for court review is running from February 21, 1957.

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The Commission orders:

(A) The action of the Commission's Secretary on March 29, 1957, in rejecting and returning the Council's petition for rehearing filed March 25, 1957, is hereby affirmed.

(B) The appeal filed by the Council on April 4, 1957, is hereby denied.

By the Commission.

/s/ J. H. GUTRIDE
Joseph H. Gutride,
Secretary

APPENDIX E

The following portions of the Administrative Procedure Act and the Natural Gas Act are relevant:

Administrative Procedure Act:

Sec. 7. In hearings which section 4 or 5 requires to be conducted pursuant to this section—

* * * * * *

(c) *Evidence.*—Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(d) *Record.* The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision in accordance with section 8 and, upon payment of lawfully prescribed costs, shall be made available to the parties. Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary. 60 Stat. 241 (1946), 5 U.S.C. Sec. 1006.

Sec. 8. In cases in which a hearing is required to be conducted in conformity with section 7—

(a) *Action by Subordinates.*—In cases in which the agency has not presided at the reception of the evidence, the officer who presided (or, in cases not subject to subsection (c) of section 5, any other officer or officers qualified to preside at hearings pursuant to section 7) shall initially decide the case or the agency shall require (in specific cases or by general rule) the entire record to be certified to it for initial decision. Whenever such officers make the initial decision and in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, such decision shall without further proceedings then become the decision of the agency. On appeal from or review of the initial decisions of such officers the agency shall, except as it may limit the issues upon notice or by rule, have all the powers which it would have in making the initial decision. Whenever the agency makes the initial decision without having presided at the reception of the evidence, such officers shall first recommend a decision except that in rule making or determining applications for initial licenses (1) in lieu thereof the agency may issue a tentative decision or any of its responsible officers may recommend a decision or (2) any such procedure may be omitted in any case in which the agency finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires.

(b) *Submittals and Decisions.*—Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or pro-

...sed findings or conclusions. The record shall show the ...ling upon each such finding, conclusion, or exception ...sented. All decisions (including initial, recommended, ...tentative decisions) shall become a part of the record ...d include a statement of (1) findings and conclusions, ...well as the reasons or basis therefor, upon all the ma...rial issues of fact, law, or discretion presented on the ...cord; and (2) the appropriate rule, order, sanction, relief, ...denial thereof. 60 Stat. 242 (1946), 5 U.S.C. Sec. 1007.

...tural Gas Act:

Sec. 7. (c) No natural-gas company or person which will ...a natural-gas company upon completion of any pro...sed construction or extension shall engage in the trans...tation or sale of natural gas, subject to the jurisdiction ...the Commission, or undertake the construction or ex...sion of any facilities therefor, or acquire or operate any ...facilities or extensions thereof, unless there is in ...orce with respect to such natural-gas company a certificate ...public convenience and necessity issued by the Commis...ion authorizing such acts or operations: Provided, how...ver, That if any such natural-gas company or prede...essor in interest was bona fide engage in transportation ...sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the

hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: Provided, however, That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. [52 Stat. 825 (1938), as amended, 56 Stat. 83 (1942); 15 U.S.C. Sec. 717f (c)]

* * * * * *

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require. [56 Stat. 84 (1942); 15 U.S.C. Sec. 717f (e)]